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DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT **C**
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



Constitutional Affairs

Justice, Freedom and Security

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Petitions

**LEGAL INSTRUMENTS AND
PRACTICE OF ARBITRATION
IN THE EU**

STUDY FOR THE JURI COMMITTEE





DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS

LEGAL AFFAIRS

Legal Instruments and Practice of Arbitration in the EU

STUDY

Abstract

Upon request by the JURI Committee, this study investigates the law and practice of arbitration across the European Union and Switzerland. It includes an in-depth examination of the practice and the laws relating to arbitration in each Member State of the European Union and Switzerland, as well as an examination of the involvement of Member States and the European Union in arbitration. While substantial harmony exists across the European Union at both the level of law and practice, the Study finds that arbitration in the European Union is predominantly regional, rather than transnational. It also concludes that investment arbitration is often a beneficial feature of investment agreements, although the terms of such agreements must be carefully designed.

DOCUMENT REQUESTED BY THE COMMITTEE ON LEGAL AFFAIRS

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LIST OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
ADRD	Directive on Alternative Dispute Resolution for Consumer Disputes
B2B	Business-to-Business
B2C	Business-to-Consumer
BIT	Bilateral Investment Treaty
FAA	Federal Arbitration Act
CI Arb	Chartered Institute of Arbitrators
CCP	Common Commercial Policy
CJEU	Court of Justice of the European Union
EU	European Union
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
IBA	International Bar Association
ICCA	International Council for Commercial Arbitration
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
ICT	Information and Communication Technology
IIA	International Investment Agreement
ISDS	Investor State Dispute Settlement
MIA	Multilateral Investment Agreement
NAFTA	North American Free Trade Agreement
ODR	Online Dispute Resolution
PCA	Permanent Court of Arbitration

SCC	Stockholm Chamber of Commerce
TFEU	Treaty on the Functioning of the European Union
TPF	Third Party Funding
TTIP	Transatlantic Trade and Investment Partnership
UNCITRAL	United Nations Commission on International Trade Law
USA	United States of America
VCLT	Vienna Convention on the Law of Treaties

EXECUTIVE SUMMARY

The purpose of this Study is to provide an in-depth, objective description and analysis of the law and practice of arbitration across the European Union and Switzerland. One of the primary goals of the Authors was to portray accurately the actual diversity of arbitration law and practice across the European Union and Switzerland, rather than merely to report on arbitration practice as it is undertaken by the leading specialists in the field, and on arbitration law in the primary arbitral jurisdictions. Consequently, it was decided to include discussion of the law and practice of arbitration of all the States of the European Union/Switzerland, in order to identify both similarities and variants, and in order to discuss the strengths and weaknesses of the law and practice observed, in the specific national contexts in which it is found.

1.1. Overview of Arbitration

Arbitration is a dispute resolution mechanism in which parties agree to have their dispute resolved by a private third-party decision-maker, rather than through litigation in public courts. The parties agree in advance that the decision-maker's ruling will be binding on them, rather than merely advisory.

Although arbitration is often described as a form of alternative dispute resolution, and it does indeed provide an alternative to court litigation, arbitration's current success has resulted substantially from the support it has received from governments and courts. Consequently, while one of arbitration's primary benefits is the freedom that it gives to parties to resolve their dispute in a manner different than that adopted in national courts, it must be remembered that arbitration is nonetheless heavily dependent on both national legal systems and national courts.

The Laws and Rules Applicable to Arbitration

The legal framework applicable to arbitration includes the laws of one or more States connected to the proceedings or to the parties, as well as the 1958 New York Convention and several other international and transnational sources of law. However, national law, particularly that of the "seat" of the arbitration (i.e. the State in which the arbitration is legally located) is the cornerstone of any arbitration.

The Agreement to Arbitrate

The fundamental rule underlying arbitration is that it is based on the consent of the parties, as most fundamentally expressed in the initial agreement to arbitrate. This agreement may include nothing beyond the mere agreement to resolve a dispute through arbitration, but may also include details of the procedure to be used. Not only must the parties agree to arbitrate any substantive issue that will be addressed in the arbitration, they also cannot be forced to arbitrate using procedures other than those to which they have consented. However, the parties may alter the terms of their original arbitration agreement at any time, through mutual consent.

The agreement to arbitrate can only bind parties to the agreement, and does not bind entities or individuals who are not parties to the agreement. This is true even if those non-parties are involved in the same or a related dispute, or if their cooperation is essential for the success of the arbitration.

The Arbitral Tribunal

The arbitral tribunal consists of one or more private individuals hired by the parties to deliver a binding resolution of their dispute. The arbitration agreement determines how the tribunal will be constituted. If the arbitration agreement does not include any provisions regarding the procedure for appointment of the tribunal, and the parties cannot subsequently agree on a procedure, national law or the rules of an arbitral institution being used by the parties will set forth the procedure.

Parties usually opt for either a sole arbitrator or a tribunal composed of three arbitrators. If the tribunal is composed of three members, each party generally has the right to appoint one arbitrator, while the chair of the tribunal is appointed by agreement. In case of a sole arbitrator, the parties need to agree on the individual appointed.

If the parties are required to agree on an arbitrator and cannot do so, or one party does not appoint an arbitrator when the agreed procedure requires them to do so, national law and institutional rules contain mechanisms for a national court or the arbitral institution to make the appointment.

In most jurisdictions parties are free to select their arbitrators, and arbitrators are not required to have specific formal requirements or other characteristics. Arbitrators must, however, be independent of the parties and impartial in the exercise of their duties.

Arbitration and the Courts

The legal effect of the arbitration agreement is that the parties waive their right to settle future or existing disputes through State courts. However, State courts may act as a facilitator of the arbitral proceedings. The powers of the courts in this respect are usually spelt out in a specific provision of national law.

In addition, after the tribunal has taken its decision, any party can bring an action before a State court in the seat of the arbitration to set the award aside (i.e. declare it invalid and unenforceable).

Arbitral Proceedings

The conduct of arbitral proceedings is principally dependent on party agreement. Although arbitrators must respect party autonomy and comply with the procedural rules the parties have selected, they also have the duty to ensure that the arbitration is conducted fairly and that due process rights are respected. The tribunal is not bound by the rules of civil evidence and discovery applicable before national courts.

Arbitral Award

An award is a decision of the tribunal, finally resolving one or more issues submitted to it by the parties. A “partial” award resolves one or more specific matters, leaving the remainder to be resolved in one or more subsequent awards. A “final” award is the primary decision of the tribunal, and resolves all remaining matters submitted to the tribunal.

Arbitral awards are binding on the parties and enforceable against them. Furthermore, arbitral awards may be recognised and enforced abroad, most commonly through the 1958 New York Convention.

Enforcing and Challenging an Arbitral Award

When an award is not complied with voluntarily, the winning party needs to enforce it. National legal systems provide mechanisms through which the successful party in an arbitration can use the coercive powers of the State to have its award enforced.

Enforcement of awards internationally is generally governed by the 1958 New York Convention. Because of the number of States party to the Convention, and the pro-enforcement provisions of the Convention, it is usually easier to enforce an arbitration award abroad than a court judgement.

Under the New York Convention, and under modern national arbitral laws, a court will only refuse to enforce an award if the procedures used in the arbitration undermined its fairness, or on rare occasions on public policy grounds. The substantive correctness of an award is not considered.

1.2. Arbitration Law in the European Union and Switzerland

Arbitrability

Since arbitrators are not State judges, arbitration cannot substitute for every type of court proceeding. In light of this, every legal system limits the scope of subjects that may be submitted to arbitration. The boundaries of arbitrability are progressively expanding, but the legal landscape in this regard is not completely harmonized: while some subject matters are almost universally considered arbitrable (such as monetary claims deriving from a commercial relationship) and others are clearly not arbitrable (such as criminal cases), different jurisdictions take different approaches, especially as far as 'grey areas' of uncertainty are concerned.

Most States included in this Study allow parties to submit to arbitration all disputes they are legally permitted to settle. However, the precise limits to arbitrability vary between States.

Scope of application (domestic vs. international)

In some jurisdictions, the laws applicable to arbitration do not distinguish in any way between domestic and international arbitration. In this case, whenever an arbitration is seated in that State, it is subject to the same law.

Some other jurisdictions, however, differentiate between domestic and international arbitration, setting forth two separate legal regimes for arbitration: one to be applied when the proceedings are seated in the State but the dispute qualifies as domestic, and one to be applied when the dispute qualifies as international. In each case this is determined by the State's own law.

The majority of States included in this Study apply the same law to both domestic and international arbitrations, but some States, including leading arbitral States France and Switzerland, have different laws for domestic arbitrations and international arbitrations.

Form of the arbitration agreement

National legal systems generally set forth requirements relating to the form of an arbitration agreement. Unless an arbitration conforms to these requirements, it is not binding on the parties.

The basic requirement in this respect is the written form: under most national laws, an arbitration agreement is valid only if it was concluded in writing.

Almost all States included in this Study require that an arbitration agreement be in writing if it is to be enforceable. However, national laws generally take a liberal approach to what constitutes a “written” agreement, including emails and incorporation by reference.

Provisional measures

If an arbitration is to be successful, provisional orders may be necessary to compel a party, or a non-party, to take or refrain from taking a certain action, such as preserving evidence. Although national courts are uniformly acknowledge to have the power to order provisional measures, the ability of arbitral tribunals to order provisional measures has traditionally been more controversial.

Most States included in this Study allow parties to an arbitration to request interim measures from either national courts or the arbitral tribunal itself. However, in some States parties must resort to State courts.

Competence-competence

Under the doctrine of competence-competence, the arbitral tribunal has the right to decide whether it has jurisdiction over the dispute brought to arbitration, rather than having to wait for the matter to be decided by a court. This is commonly referred to as the “positive effect” of competence-competence, as it affirms the existence of a power on the part of arbitral tribunals. However, in some jurisdictions competence-competence also produces what is called a “negative effect”, pursuant to which State courts lack the power to examine the validity of an arbitration agreement, even if requested to do so, unless it is on its face invalid.

Competence-competence only relates to the right of a tribunal to make an initial determination of its jurisdiction. Courts retain the right to make a final determination of the validity of an arbitration agreement, and are not bound by the arbitral tribunal’s decision. All States included in this Study allow arbitrators to rule on their own jurisdiction. However, differences exist regarding the point at which a national court may itself decide on the jurisdiction of an arbitral tribunal.

Arbitrator’s qualifications

In light of the importance of the task that arbitrators must perform, some minimal mandatory qualifications are sometimes imposed by national law.

Almost all States included in this Study allow parties complete freedom in selection of arbitrations, and do not require that arbitrators possess certain qualifications or other characteristics.

Independence and impartiality

Since arbitrators perform adjudicatory functions, it is fundamental that they are independent and impartial: these duties are generally enshrined in all national arbitration laws. “Independence” refers to the objective relationship between the arbitrator and the parties; “impartiality”, on the other hand, focuses on the subjective mindset of the arbitrator with respect to the case pending before him.

Breach of the duties of impartiality and independence is sanctioned by national arbitration laws in two main ways. Firstly, arbitrators can be challenged and subsequently removed

from an arbitration. Secondly, an award rendered by arbitrators who were in breach of their duty of independence and impartiality can be set aside or refused enforcement.

States included in this Study differ in their approach to independence and impartiality. In some cases, the law simply states that an arbitrator can be challenged whenever a situation occurs that gives rise to justifiable doubts regarding an arbitrator's independence and impartiality. In other cases, the law expressly lists circumstances that will be held to give rise to doubts regarding an arbitrator's impartiality or independence.

Ad hoc vs. institutional arbitration

The basic form of arbitration, in which two parties agree on an arbitral tribunal to decide their dispute, without the involvement of any arbitral institution, is commonly referred to as *ad hoc* arbitration. In institutional arbitration, while the arbitral proceedings themselves are still controlled by the arbitral tribunal, and the tribunal remains free to reach its own decision, the administrative elements of the arbitration are managed by the arbitral institution.

All States included in this Study leave the decision between *ad hoc* or institutional arbitration up to the parties, although a small number of States restrict the establishment of arbitral institutions in some way. A similarly small number, while not prohibiting *ad hoc* arbitration, have legal provisions that substantially reduce its attractiveness.

Consumer arbitration

Consumer contracts are, in important respects, different from common civil and commercial relationships, since the consumer is a non-professional contracting party acting from an economically disadvantaged bargaining position. As a result, the use of arbitration for the resolution of consumer disputes entails the risk that consumers will be subjected to an unfair arbitral proceeding.

As required by European Union law, all States included in this Study restrict consumer arbitration in some way, although approaches vary significantly. This Study recommends that tighter controls be imposed on consumer arbitration than currently exist under European Union law.

Setting aside of awards

Unlike first instance court decisions, arbitral awards cannot generally be appealed, even if they are demonstrably mistaken. They can, however, be "set aside" in a very limited number of situations relating to procedural unfairness, or rarely on the grounds of public policy.

States included in this Study overwhelmingly adopt the approach just described. In addition, a small number of States allow appeals to be made on questions of law in certain specified circumstances.

1.3. Arbitration Practice in the European Union and Switzerland

The results of the Survey undertaken as part of this study indicate that arbitration is a specialized and competitive practice, in which early engagement with arbitration is important, but that nonetheless remains open to entry even until late in a practitioner's career. Similarly, arbitration remains a field of practice involving a range of participants, for most of whom arbitration constitutes a minority of their legal work, rather than a being highly specialised field practiced only by a small number of individuals.

The practice of arbitration in the European Union is less transnational than it is usually portrayed as being. While there is a group of practitioners for whom arbitration is indeed a transnational field, the practices of most arbitration practitioners are generally strongly national or regional.

Moreover, most arbitration practitioners not only practice regionally, but view arbitration as a field with a regional emphasis. When asked, for example, to recommend a State in which to seat an international arbitration, practitioners are far more likely to recommend a State that has geographic or cultural connections with their own State than they are any other State, with only four States (England, France, Sweden, Switzerland) genuinely achieving Europe-wide recognition.

In turn, there is no consistent set of procedures used in arbitrations across the European Union. Instead, procedures differ regionally, even in international arbitration, reflecting the differing backgrounds and preferences of the individuals involved.

Diversity remains a significant problem within arbitration. Only 19.25% of arbitration practitioners who responded to the Survey were female. This number declines to 15.88% among those individuals who have served as an arbitrator within the past five years. Diversity issues become even more pronounced when ethnicity is considered, with 97.95% of practitioner respondents describing themselves as White, and this number increasing to 98.76% among individuals who have served as an arbitrator in the past five years.

There is evidence of an increasing diversity of States being recognised as potential arbitral seats. However, this recognition remains restricted to States in Western Europe, and no Eastern European State has yet achieved more than a peripheral place as an arbitral seat.

1.4. Commercial Arbitration and the European Union

Arbitration and EU law interact with each other

Although the relationship between EU law and international arbitration has traditionally been described as one of mutual indifference, the two systems interact with each other, rather than simply coexisting. Arbitration may facilitate the EU's goals of ensuring access to efficiently-delivered justice and dispute resolution, but it can also impede the EU's goals of harmonizing law across the Member States and of ensuring the application of specific substantive laws.

Arbitral tribunals cannot make references for preliminary rulings to the Court of Justice of the European Union

When a Member State Court needs to apply EU law, but is uncertain as to its interpretation, it can (or, in some cases, must) make a preliminary reference to the Court of Justice of the European Union. Commercial arbitration tribunals, on the contrary, do not have such a power.

Given the central role that arbitration has come to play in the application of law in the European Union, arbitral tribunals should be permitted to seek a preliminary ruling from the CJEU, in order to ensure a uniform and consistent application of EU law.

The Brussels I Regulation excludes arbitration from its scope of application

The Brussels I Regulation has created a uniform European regime regarding jurisdiction and recognition of judgments in civil and commercial matters. The Regulation expressly excludes arbitration from its scope of application: the ability to enforce arbitral awards

abroad, therefore, even within the European Union, is regulated by the parallel regime set forth by the 1958 New York Convention.

Problems arising from the arbitration exclusion in Brussels I

Practice has shown the limits of the parallel system created by the Brussels I system and the arbitration exclusion enshrined therein. The *West Tankers* case has brought to light a clash between the regime of international arbitration and that of EU law, creating a number of uncertainties.

In particular, the principle of mutual trust underlying the Brussels I Regulation entails that court judgments rendered in breach of an arbitration agreement must be respected by courts across the European Union, thus undermining the functionality of arbitration as a mechanism of dispute resolution. The recast Brussels I Regulation aims at resolving the uncertainties highlighted by the practical interferences between arbitration and court litigation.

The recast Brussels I Regulation maintains, but clarifies, the arbitration exclusion

The recast Brussels I Regulation maintains the arbitration exclusion of its predecessor, but clarifies how it must be interpreted. The Regulation also expressly recognizes the prevalence of the 1958 New York Convention, which should in principle always prevail over the Brussels I system.

The arbitration exclusion applies to court judgments regarding the arbitration agreement

Recital 12 of the recast Brussels I Regulation confirms that arbitration falls outside of the scope of the Regulation, and Member States are left free to comply with their international obligations under the New York Convention.

Member State court judgments on the existence and validity of an arbitration agreement do not circulate under the Regulation and therefore do not bind other courts.

The problem of judgments on the merits

The recast Regulation applies to court judgments on the merits of the case, even if the court has also ruled on the inexistence or invalidity of an arbitration agreement as a preliminary matter.

Nonetheless, a conflicting award on the same subject matter should in principle prevail over the court judgment, because the New York Convention takes precedence over the Regulation. However, it is not clear whether arbitral tribunals are free to disregard the contents of an earlier court judgment, or whether the latter can be denied recognition because of its conflict with an arbitral award.

Therefore, the recast Regulation does not solve all of the problems arising from the interference between arbitration and court litigation.

The arbitration exclusion extends to ancillary measures

The arbitration exclusion covers not only arbitration in itself, but also proceedings before State courts in support of arbitration, such as, for example, proceedings for the appointment of an arbitrator.

Anti-suit injunctions are incompatible with EU law

The recast Regulation does not affect anti-suit injunctions, i.e. measures restraining one party from starting or continuing litigation before a State court in breach of an arbitration agreement.

Anti-suit injunctions, irrespective of whether they are issued by a State court or by an arbitral tribunal, are incompatible with EU law, because they deprive Member State courts of their power to assess their own jurisdiction under the Regulation, and thus violate the principle of mutual trust.

Possible ways forward

Future reforms could address the problems of the interference that can occur between arbitration and court litigation. It could be provided that only the State courts at the seat of an arbitration can decide whether an arbitration clause is valid. Whenever a different Member State court is seised of an action that is covered by the arbitration agreement, said Court would have to stay the proceedings if the defendant raises an objection based on the existence of the agreement, while the defendant applies before the State court at the seat of the arbitration for a declaration regarding the existence and validity of the arbitration agreement.

Public policy

Public policy may limit the enforceability of arbitration agreements or awards if they conflict with imperative norms or fundamental principles of law. In international arbitration, the public policy exception is usually interpreted narrowly.

The CJEU has developed a more extensive interpretation than is customary in jurisprudence relating to arbitration, based on norms of EU law, but has unfortunately not yet clarified the boundaries of EU public policy in the arbitral context. While the case-by-case approach adopted so far allows for a considered evaluation by the Court, it also introduces considerable uncertainty in the arbitration context, as it is entirely unclear at the present time which provisions of EU law constitute part of EU public policy, and so will form a ground for the annulment of an arbitral award, a refusal to enforce it, or a refusal to enforce an arbitration agreement.

Given the increasing range of topics addressed by EU law, clarity on this point is greatly needed.

1.5. States and Arbitration in the European Union

This part of the study addresses the main problems regarding the involvement of States in arbitration in the European Union. While discussion is provided of the involvement of States and State entities in commercial and State-State arbitration, the primary focus is on the participation of States in investment arbitrations, as it is in this context that the greatest controversies have arisen.

Article 207 of the Treaty on the Functioning of the European Union states that the Union has exclusive competence in the field of foreign direct investment. Thus, the EU has the power to conclude international investment agreements with third States, and to include investment arbitration provisions therein. In order to understand the consequences of such an important evolution in the powers of the EU, the study analyses the origins and the legal sources of international investment law within the EU, describes the interaction between

investment law and EU law, and finally assesses the impact of investment arbitration in the European Union.

Member States have already concluded a high number of Bilateral Investment Treaties (BITs)

International investment law gained prominence in Europe long before Article 207 TFEU included foreign direct investment in the Union's common commercial policy. Over the decades, Member States have concluded over 1,300 BITs.

The difference between intra-EU and extra-EU BITs

It is necessary to differentiate between intra-EU BITs, i.e. investment treaties concluded between two Member States, and extra-EU BITs, concluded between a Member State and a third State. Intra-EU BITs are merely internal agreements from the point of view of EU law. In contrast, extra-EU BITs involve the participation of a non-Member State.

Extra-EU BITs remain into force until their expiry, termination or substitution with a new agreement concluded by the European Union according to Article 207 TFEU. The problem of the ongoing validity of intra-EU BITs is much more controversial and still unsettled.

The European Commission has made efforts to ensure consistency between extra-EU BITs and EU law

Extra-EU BITs afford standards of protection which are not necessarily the same as those offered by EU law. On several occasions, the Commission has taken action to ensure consistency between European BITs and EU law, such as the 2004 infringement proceedings against Austria, Sweden and Finland. After the entry into force of the Treaty of Lisbon, the management of existing treaties is streamlined by Regulation 1219/2012.

The 'Grandfathering Regulation' (Regulation 1219/2012) sets forth a regime for the management of existing extra-EU BITs

Regulation 1219/2012 (commonly referred to as the 'Grandfathering Regulation') sets forth a transitional regime for extra-EU BITs. Member States must apply for a specific authorization from the Commission if they wish to maintain their extra-EU BITs in force until their replacement. Thanks to this mechanism, the Commission can assess whether the agreements are incompatible with EU law and subsequently deny the authorization where appropriate. As for future agreements, Member States are generally no longer allowed to conclude them.

Intra-EU BITs are still valid according to the case-law of investment arbitration tribunals

Member States have concluded more than 170 intra-EU BITs. These agreements were generally born as extra-EU BITs, concluded between a Member State and a third State, with the latter subsequently acceding to the EU. The validity of intra-EU BITs is controversial, as it could be argued that intra-EU BITs are now terminated, as they have been superseded by EU law after the accession.

However, investment treaty tribunals have so far concluded that intra-EU BITs are still valid, because they do not cover the same subject-matter as EU law, nor do they share the same legal nature.

Intra-EU BITs raise problems of compatibility with EU law

As the contents of intra-EU BITs can differ from that of EU law, their ongoing validity entails the risk that some European citizens enjoy rights that are not available to others. These treaties thus raise significant problems of compatibility with EU law.

One of the main arguments in this regard is that investment tribunals are not bound to respect EU law, even if they decide on subject matters covered by the TFEU and regulated by EU law. In addition, even if arbitral tribunals were to apply EU law, they could not request a preliminary ruling from the Court of Justice of the European Union under Article 267 TFEU. Further problems arise from the circumstance that the payment of an award could amount to illegal State aid under Article 107 TFEU.

Free transfer of capital provisions in investment treaties should be uniformed with Articles 64-66 TFEU

Investment treaties often afford the investor an unrestricted right to the free transfer of capital. Articles 64-66 TFEU, however, impose several limitations on free movement of capital.

Future investment agreements should adopt corrective solutions and introduce limitations to the free transfer of capital, in order to ensure consistency with EU law.

Maintaining the Union's policy space through accurate drafting

Substantive standards of investor protection should be drafted carefully, limiting the broadness of the wording currently used for most international investment agreements, and thus limiting the discretionary power of arbitral tribunals. Future European agreements should aim at striking a balance between protection of European investments abroad and the creation of a consistent and clearly-assessable legal regime, ensuring the Union's ability to regulate in the public interest while also ensuring a predictable environment for foreign investors.

Right respondent and internal liability under future European treaties

Since both the EU and Member States will be parties to future treaties, foreign investors could, in principle, bring an investment claim against either the European Union itself or against the host Member State.

Regulation 912/2014 sets forth a general rule: the subject that has afforded the treatment giving rise to the investor's claim acts as the respondent. The Regulation also lists some exceptional cases where the European Union can act as the respondent even if the treatment was afforded by the Member State. Internal liability follows the same rule, with an important exception: the European Union will be responsible when the impugned Member State action was required by EU law.

The problem of transparency

One of the main points of criticism of the current regime of investment arbitration is that cases involving issues of public interest are decided in private. The Study analyses the contents of the 2014 UNCITRAL Transparency Rules for treaty-based investor-State arbitration and assesses to what extent their use can resolve problems arising from the confidentiality of ISDS proceedings.

The problem of consistency

Arbitral tribunals have no duty to decide the case consistently with past arbitral decisions on similar issues; therefore, there is a potential risk of inconsistency of arbitral awards.

One way to resolve this problem would be to introduce an appellate mechanism in future treaties, allowing a second instance body to review arbitral rulings. However, an appellate mechanism will raise legitimacy difficulties regarding the individuals appointed to undertake the review, as well as limiting the influence of individual Member States over the resolution of the disputes to which they are a party.

Moreover, contradictions between arbitral awards largely depend on the broad wording of the applicable standards of protection. Therefore, the problem of consistency can also be addressed through a clarification of the applicable substantive rules.

In this regard, the inclusion of more detailed definitions of general standards, such as fair and equitable treatment, or the introduction of a mechanism through which the States party to the investment treaty can issue binding interpretations of the treaty's terms would limit arbitrators' discretionary powers and, therefore, reduce the risk of conflicting decisions.

1. PART A – OVERVIEW OF ARBITRATION

1.1. An Introduction to Arbitration

Arbitration is a mechanism of adjudicative dispute resolution, whereby the parties refer their case to a private arbitral tribunal. The parties will be bound by the award (i.e. the decision of the arbitral tribunal).

Arbitration is largely regulated by party autonomy: the parties can, *inter alia*, determine the scope of the arbitration agreement and choose the arbitrators. Therefore, arbitration is more flexible than ordinary litigation before State courts, where the selection of judges in a particular case is determined by law and the parties cannot by agreement limit or in any other way restrict the competence or authority of the court. Thus, the principle of party autonomy renders arbitration fundamentally a private affair, as opposed to the public nature of court litigation.

It is necessary to make some distinctions from the outset. Firstly, arbitration can be domestic or international. This will be determined by the specific requirements of each State's national arbitration law, however an arbitration is typically domestic where the parties are nationals of the country where the arbitration is seated and the dispute is only of domestic concern. By contrast, an arbitration is usually deemed to be international if the parties possess a different nationality and/or the dispute is international in nature. Although in some States there are notable differences in the regulation of domestic and international arbitration, in many States the same rules apply to both.

The second distinction is between commercial and non-commercial forms of arbitration, which are again sometimes regulated differently. Parties involved in commercial transactions are generally regarded as sophisticated equals, capable of protecting their own interests and making informed decisions regarding the use of arbitration as a dispute resolution mechanism. The most notable example of a non-commercial arbitration is consumer arbitration. In this context the disparity between the parties in terms of both legal sophistication and bargaining power usually results in special protections being granted to the consumer, in order to ensure both that the consumer genuinely consents to arbitration, and that the resulting arbitral procedure is fair.

The third distinction is between *ad hoc* and institutional arbitration. The former is undertaken by the parties without the involvement of an arbitral institution, and must therefore handle all the aspects of the arbitration themselves. In the latter, on the other hand, the parties hire an arbitral institution to manage the administrative aspects of the arbitration, thereby also gaining the ability to use the institution's arbitral rules.¹ While *ad hoc* arbitration remains popular in some States, institutional arbitration is becoming the norm in international arbitration.

The fact that arbitration is based on private agreements and largely regulated by permissive rules of private law does not mean that it exists wholly outside any sphere of public regulation. On the contrary, most national legal systems have implemented an arbitration law, in addition to a combination of statutes and laws that address issues pertinent to arbitration. Such laws serve a multitude of purposes, but ultimately aim to make arbitration as fair and effective as possible while still respecting party autonomy.

¹ Arbitral institutions are usually not public entities, but rather private bodies offering a service for money or for the benefit of their members (e.g. in cases of trade associations acting also as arbitral institutions). It should be noted that the parties are free to choose the seat of their arbitration and are not necessarily constrained in this respect by the location of the arbitral institution itself.

Arbitration legislation therefore includes both mandatory and non-mandatory rules, with mandatory rules setting the outer limits within which party autonomy is able to operate.

The key features of arbitration are the following: a) it is chosen by the parties; b) its legal basis rests on the parties' agreement; c) the parties dictate the law or rules to be applied by the arbitral tribunal; d) the parties choose the seat of the arbitration; e) the arbitral process may be confidential if the parties so wish; f) arbitral awards can be enforced in the same way as court judgments, according to local procedural laws; g) in "arbitration-friendly" jurisdictions the intervention of local courts serves mainly to facilitate arbitration, rather than to regulate it.

While arbitration is often portrayed as being faster and cheaper than litigation in State courts, this is no longer clearly true. The increased popularity of arbitration as a dispute resolution mechanism has resulted in an increasing convergence between arbitration and litigation procedures, both because of the involvement of litigation-experienced lawyers in arbitral proceedings and because of an insistence by parties on confrontational tactics similar to those characteristic of court litigation. As a result, contemporary arbitration is best understood not as providing a fast and cheap alternative to litigation, but rather, because of its procedural flexibility and the enshrinement of party autonomy throughout arbitration, as providing the possibility of a fast and/or cheap procedure to those parties who wish one.

Arbitration is not the only private method of resolving disputes outside the courts but, like litigation and unlike alternative dispute resolution (ADR) mechanisms, the results of an arbitrator's determination (namely the award) is binding upon the parties. Thus, arbitration and litigation are both binding forms of adjudicative dispute resolution and must be distinguished from those that are not binding, such as negotiation and mediation. Negotiation is a process in which the parties discuss their dispute directly with the aim of reaching a friendly resolution or other settlement. If the discussion proves successful, the parties will draw up a contract reflecting their agreement. Mediation involves a discussion of the dispute through one or several intermediaries (mediators), who will attempt to bring the parties to agreement. The mediator may also draw up a report with his or her conclusions and recommendations to the parties as to the final outcome. This report will not be binding on the parties, who are free to adopt or reject it. If it is rejected, the parties may then turn to binding forms of dispute resolution, whereas, if they accept the mediator's proposal, they can draw up a contract enshrining the settlement.

However, although arbitration is most commonly used as a private method of resolving dispute, it has also long been used to resolve disputes involving States, due to the reluctance of States to subject themselves to the jurisdiction of the courts of another State. Arbitration addressing a dispute between two States is commonly referred to as State-State arbitration, and is a longstanding form of international dispute resolution.

In addition, however, the involvement of States in commercial activities can result in arbitrations between States and non-State entities or individuals, arising from disputes related to commercial transactions in which the State or State entity has been involved. In this context the State is generally treated as merely another commercial actor, its traditional "sovereign immunity" being waived by its consent to arbitration, although immunity may still exist with respect to enforcement against the State of any arbitral award.

Recently a third type of arbitration involving States has also become prominent, in which arbitration is used to resolve disputes between States and non-State foreign investors regarding a dispute arising out of the investor's investment activities in the State. Distinctively, while a State's consent to arbitrate with a foreign investor can be included in a contract between the State and the investor, it is often included instead in a treaty between the State and the investor's home State. In such a situation the State is held to have made a "standing offer" to arbitrate with investors from the other State party to the treaty, an arbitration agreement becoming effective when the State's offer is accepted by an investor.

The flexibility of arbitral procedure has also led to arbitration being widely adopted for disputes of low financial value. Consumer and online arbitration are encompassed within this paradigm. These types of arbitration are based on the commercial arbitration model, but are subject to several peculiarities justified by their nature. The principal distinctive feature with respect to consumer arbitration is that since business-to-consumer (B2C) disputes involve a significant disparity between the parties, both in terms of legal sophistication and bargaining power, there is a significant risk that the business party may be able to dictate the terms of arbitration and thereby use the procedural flexibility of arbitration to violate the parties' right to a fair hearing.

Online arbitration is particularly popular in the consumer context, both because it particularly lends itself to low cost proceedings and because it does not require the parties to convene in a single geographic location for a hearing. However, it can also be used to resolve business-to-business disputes, and is growing in popularity in that context.

1.2. The Laws and Rules Applicable to Arbitration

The regulation of international arbitration is shaped by several sources of law, including national legislation, international law and transnational rules. Indeed, the legal framework applicable to any given arbitration may involve the laws of more than one State (e.g. the seat of the arbitration, the law applicable to the parties, the governing law of the contract, the governing law of the arbitration agreement and the law of the country of enforcement of the award).

As for the arbitral agreement, it is important to highlight that the arbitration clause (or a distinct arbitration agreement) may be subject to a law that is different from the law governing the substance of the contract in which it is contained (or, in the case of a separate agreement, the substantive law governing the dispute). If the parties have agreed upon the law governing the arbitration agreement, the arbitrator or the courts of the seat of the arbitration will usually adopt one of two options: a) assimilate this to the contract's governing law, or; b) substitute this with the law of the seat.

While national law is clearly central to arbitration if it provides the substantive law governing the dispute, it is also fundamental from the procedural point of view. The law of the "seat" of the arbitration (i.e. where the arbitration is legally located) is commonly referred to as the *lex arbitri*, and governs the operation of the arbitration. However, while the seat of the arbitration determines the rules in accordance with which the arbitration must operate, this does not mean that the arbitration must be conducted on the territory of the seat: the hearings and the other procedural activities can, in principle, generally take place wherever the tribunal and the parties deem appropriate. The seat of an arbitration, that is, is not the geographical place of the proceedings, but is instead a purely legal concept, which links the arbitration to a national legal system and to its procedural law.

While, as noted, in principle no aspect of the arbitration generally needs to take place in the territory of the arbitral seat, in practice complete separation of this type is rare, and most arbitrations take place largely or completely in the territory of the seat. One reason for this is that the arbitral proceedings may need the support of the State courts of the seat, and State courts have geographically limited jurisdiction. While under some national laws State courts are permitted to assist arbitrations seated in the State but taking place outside the State, orders and judgements from such courts nonetheless retain their traditional geographical limitations. Consequently, a decision to separate completely arbitral proceedings from the seat of the arbitration can have serious negative effects for the effectiveness of the arbitration. The State court entrusted by the law of the seat with the task of supporting an arbitration is often referred to with the French expression *juge d'appui*.

The *lex arbitri* also determines the circumstances under which the arbitral award can be set aside or annulled (i.e. declared invalid and unenforceable), and the procedure that must be followed for this to be done.

Finally, national law is relevant for the enforcement of foreign awards. Although this process is usually regulated by the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), to which 149 States are party, the Convention itself refers both to the *lex arbitri* and to the law of the country of enforcement.² This circumstance has several consequences, but as one example, foreign awards that are not compliant with the public policy of the State where enforcement is sought, or which otherwise deal with a subject matter that is not arbitrable under its laws, can be denied enforcement.

As is clear from the preceding discussion, national law is central to arbitration, including international arbitration. However, it should also be recognised that in all States in which arbitration constitutes a significant field of legal practice, national authorities and national law generally operate as an enabler of arbitration, rather than as a regulator of it. That said, however, it is also clear that State courts must possess the capacity to intervene in arbitrations in situations in which the freedom generally awarded to arbitration is being abused. As a result, arbitration-friendly nations seek to strike a balance between respecting and supporting party autonomy and the need to ensure a fair resolution of disputes.

While national law is the cornerstone of arbitration, international agreements have played a central role in arbitration's growth to its current position of prominence. As with national law, however, the primary goal of such agreements has been to facilitate the effective functioning of arbitration in accordance with party autonomy, rather than to control its operation or mandate its form. The most important treaty in this respect is the aforementioned 1958 New York Convention. In addition, some States also regulate the same issues at regional level. Examples include the 1975 Inter-American Convention on International Commercial Arbitration and the 1983 Riyadh Convention on Judicial Cooperation between States of the Arab League.

In the field of international investment arbitration, treaties hold a central place. The Washington Convention, which established the International Centre for the Settlement of Investment Disputes (ICSID), is the cornerstone of investment arbitration, as it provides for the international forum in which the majority of investment disputes are administered. Importantly, however, investors cannot commence an arbitration against a State merely because the State is a party to the Washington Convention: the State must instead specifically consent to arbitrate with that investor, either through an agreement between the State and the investor or in an agreement between the State and the investor's home

² See New York Convention, Articles I and V(I)(e).

State. Investment arbitration is thus often provided for in international investment agreements, both in bilateral investment treaties (BITs), and in multilateral investment agreements such as the Energy Charter Treaty and the North American Free Trade Agreement (NAFTA).

Given the centrality of respect for party autonomy to both modern national arbitration laws and international treaties relating to arbitration, it is perhaps unsurprising that non-binding “soft law” instruments also play a key role in international commercial arbitration. Soft law instruments may be created by States or by non-State organisations, and impact upon arbitral practice not by setting out binding legal rules, but by enumerating standards that are voluntarily adopted as examples of “best practice” in the context of arbitration.

The United Nations Commission on International Trade Law (UNCITRAL) is particularly important in this regard, through its meticulous standard-setting work in various fields of arbitration. Of particular importance is the UNCITRAL Model Law on International Commercial Arbitration, whose aim is to serve as the benchmark for the harmonisation of arbitration laws and statutes worldwide. In other words, the Model Law aims at setting a single standard for controversial issues such as award nullity, recognition, enforcement, grounds for court intervention etc. The UNCITRAL Model Law has proved extremely successful, both as the foundation for the national arbitration laws of many States, and more broadly by setting a standard against which arbitration laws are often judged.

In addition to the UNCITRAL Model Law, however, UNCITRAL has also adopted Arbitration Rules, specifically designed to be used by parties in *ad hoc* arbitration (although they can also be used in institutional arbitrations where desired). The UNCITRAL Arbitration Rules have been extensively applied and are often viewed as a standard upon which other rules are to be predicated.³

A further form of soft law are the arbitration rules of the numerous arbitral institutions worldwide. Such rules possess a dual legal nature. On the one hand, given that they are of private origin, they are not statutes and hence constitute soft law. On the other hand, to the degree that parties to a contract agree to submit a dispute to an arbitral institution, and by extension to its rules, the rules are thereby binding on the parties. Importantly, however, while institutional arbitration rules may be binding on the parties, they are generally designed to enhance party autonomy, rather than to curtail it. Consequently, the parties, by mutual agreement, or through a decision of the arbitrators, can usually waive or alter certain provisions (such as time limits and deadlines). The institutional rules of the leading arbitration institutions have, just like their UNCITRAL counterpart, achieved significant influence in international practice, even where they are not formally binding

Finally, in recent years a number of initiatives concerning arbitrator ethics have arisen. Codes of ethics exist in most institutional rules, in one form or another, or as stand-alone instruments: typical examples in this regard are the AAA Code of Ethics for Arbitrators and the IBA Rules of Ethics for International Arbitrators.⁴ These rules may be binding on arbitrators in some circumstances, such as arbitrators are appointed in an institutional arbitration. However, such rules have been held by some State courts to elaborate, in the form of soft law, a body of ethical obligations to which arbitrators should adhere even if they are not formally bound by them.

³ See Caron & Caplan (2013).

⁴ In the context of investment arbitration, mini-codes of ethics may also be found in some multilateral treaties, such as Annex 14(c) of the EU-Korea FTA and the code of conduct prescribed for persons sitting on dispute settlement panels under chapters 19 and 20 of NAFTA.

1.3. The Agreement to Arbitrate

The fundamental rule underlying arbitration is that it is based on the parties' consent, which is expressed or reflected in some sort of verifiable agreement. By extension of this principle, an arbitration agreement can usually only bind the parties to that agreement, and imposes no obligations on other individuals or entities not party to the agreement.⁵

The form that an agreement to arbitrate should be required to have has been a matter of significant controversy. In broad terms, two general forms are recognised in theory and in practice: arbitration clauses and submission agreements (*compromis*). An arbitration clause is a clause in a contract in which the parties to the contract agree to refer to arbitration all or certain categories of disputes arising out of or relating to the contract. Because at the time of contracting the parties have no way of knowing the nature of the disputes that will arise, an arbitration clause is inherently aimed at unknown future disputes.

A submission agreement, on the other hand, is an arbitration agreement entered into by two or more parties after a dispute has arisen. Because the submission agreement refers to an existing dispute, a submission agreement is often far more detailed than an arbitration clause, as the parties typically elaborate on the various aspects of the arbitration, such as the names of arbitrators and possible exceptions to the institutional rules of their choice.

As an arbitration agreement is fundamentally contractual, it may not be withdrawn or in any way altered without the consent of all parties to the agreement, even if one of the parties no longer perceives it as favourable. The parties' agreement to arbitrate, that is, binds them throughout the life cycle of their legal relationship. Although it is far from unusual for parties to attempt to avoid arbitration agreements, or to challenge their validity, most national law and the New York Convention set forth effective regimes of enforcement of arbitration agreements. Consequently, once such agreements are validly concluded, it is rare for parties to be able to avoid submitting their disputes to arbitration.

With respect to the required form of an arbitration agreement, the classical requirement is that it must be in writing, as seen in both the UNCITRAL Model Law⁶ and the New York Convention.⁷ The reference to a "writing" arises from the fact that this requirement was first introduced at a time when agreements printed or written on paper were the norm. However, technological developments over recent decades have made the classical notion of a "written" agreement unrealistic, as contemporary agreements may never be put in paper form. Rather than abandon the requirement of a written agreement, however, the standard practice has instead been to expand what qualifies as a "written" agreement, so that it is now broadly accepted that an arbitration agreement included in emails, faxes, and other modes of telecommunications that produce a record of communications qualify as "written". This state of affairs is clearly reflected in the most recent version of the UNCITRAL Model Law.⁸ As a result, in arbitration-friendly jurisdictions, agreements may validly be recorded in an exchange of emails or other verified forms of communication. The

⁵ There are, however, some exceptions to this general rule. For example, several jurisdictions recognise that recourse to arbitration – and the parties' consent to submit a dispute thereto – need not necessarily arise from a contract, but can also derive from a trust instrument (as well as testamentary wills or corporate articles of agreement). This is, however, exceptional, although standard practice in many nations, because one of the parties to a trust relationship, namely the beneficiary, is not a party as such to the trust deed; the beneficiary is merely intended to receive some future gain from property or assets transferred to the trust ownership of the trustee by the owner of the assets, known as settlor. It is obvious that in respect of trust relationships the beneficiary, while being a third party to the original trust relationship, is fully encompassed by the parties' arbitration submission. The principal, but not sole, theoretical premise for this outcome is that the purpose of the trust deed was for the benefit of the beneficiary and therefore it is in his or her interest to be a party to the arbitration.

⁶ UNCITRAL Model Law, Article 7(2).

⁷ New York Convention, Art II.

⁸ UNCITRAL Model Law, Articles 7(3)-(5).

use and flexibility of electronic signatures makes this task even easier. Indeed, the requirement that an arbitration agreement be “written” has been so significantly expanded in recent decades that in many jurisdictions an arbitration agreement may qualify as written where the agreement itself was purely oral, but the oral agreement was made with reference to a specific written text.

While the requirement that an arbitration agreement “written” is standard, a small number of jurisdictions do now allow purely oral arbitration agreements. In addition, some jurisdictions allow arbitration agreements to be created through conduct-based estoppel. Conduct-based estoppel occurs in exceptional cases in which the conduct of the parties is deemed to implicitly entail an agreement to arbitrate.⁹ However, while there are continuing moves towards the expansion of the acceptance of unwritten arbitration agreements, it remains a minority practice, and States have generally preferred to adopt ever more flexible interpretations of what constitutes a “written” arbitration agreement, than to dispense entirely with the writing requirement.

Because an arbitration agreement has legal consequences, parties to an arbitration agreement must possess legal capacity if it is to be binding. Legal competence to enter into an arbitration agreement is determined by the law applicable to the parties, rather than by the law applicable to the arbitration agreement or by the law of the seat of the arbitration. Where an agreement to arbitrate was entered into by an entity that lacked appropriate legal capacity, that agreement is void. Moreover, if an arbitration is held based on such an agreement, any award arising from that arbitration may be set aside, or recognition and enforcement may be denied.

While arbitration agreements are generally treated as standard contractual agreements, one unique doctrine has been developed that has become central to arbitration practice, namely the “separability” of an arbitration clause from the contract in which it is contained. An arbitration clause, that is, is essentially treated as a completely separate contract from the contract in which it is incorporated. Because of this doctrine, not only may the law applicable to an arbitration clause be entirely different to the law applicable to the contract in which it is contained, but an arbitration clause may remain binding on the parties to a contract even if the contract itself has ceased to be binding, or indeed was never binding.

Just like other contracts, agreements to arbitrate are subject to interpretation as regards their scope, including with respect to whether the parties to the agreements intended to submit particular disputes to arbitration. The issue of scope is important because if a dispute is found not to be covered by an arbitration agreement, it cannot be taken to arbitration, and must instead be dealt with through litigation in State courts.¹⁰ Although the specific approach adopted to the interpretation of the scope of arbitration agreements will vary between jurisdictions, recent case-law is generally in favour of a broad interpretation: unless proven otherwise, the parties generally intend for all relevant disputes to be encompassed by their arbitration agreement. Of course, however, where specific language is included in an arbitration agreement specifying that a more restrictive approach is applicable, this will be respected by both courts and arbitral tribunals. To avoid misunderstandings, however, arbitral institutions often promote model arbitration clauses,

⁹ An example of conduct-based estoppels can be found in ship-towage. Ship-towage within ports or following distress signals is generally perceived as a contract between the ship owner (acting through the ship master as agent) and the towage company; depending on the particular practice established in each port any disputes arising from this relationship may implicitly be agreed to be submitted to arbitration.

¹⁰ An illustration should provide a clearer picture. X and Y enter into an agreement whereby X is to deliver bolts to Y by a specified date. Y is furious with X’s delay and spreads false information about him in the market and bribes another person to lie about X if their dispute ever goes to litigation or arbitration. If the arbitration clause between X and Y is construed as encompassing only disputes arising from their sale relationship as such, tort claims by X relating to Y’s behavior would fall outside the arbitration clause.

whose wording is broad, and intended to ensure that all disputes between the parties and relating to the transaction are submitted to arbitration.¹¹

Although the arbitration agreement is in principle only binding between the parties to that agreement, it is sometimes argued that it should be interpreted as also encompassing third parties who have not signed the original agreement. For example, in situations of subrogation, as is the case with insurance, the insured person's claim is transferred to the insurer; hence, it would be unreasonable for the latter not to be encompassed by the arbitration clause entered into by the insured person. In the same light, when an agent signs a contract on behalf of his principal, the principal is usually held to be bound by the arbitration clause signed on his behalf by the agent.

Agreements to arbitrate are of a vastly different nature in the context of international investment arbitration. In that context, while an agreement to arbitrate may be included in an investment contract entered into directly between a foreign investor and the State in which the investment was made (the host State), the arbitration agreement may also be included in a treaty between the host State and home State of the foreign investor. In this latter instance, the host State is held to have made a "standing offer" to all investors from the other State who are covered by the treaty, to arbitrate any disputes alleging that terms of the treaty have been violated, to the investor's detriment. This offer is understood to remain in place so long as the treaty is in effect. However, the arbitration agreement itself is only formed when a specific investor "accepts" the State's offer to arbitrate. In contrast to a traditional arbitration agreement, then, in which parties agree to arbitrate specific disputes with one another, in investment treaty arbitration the host State is unaware of the identity of the investor until the investor decides to "accept" the host State's offer to arbitrate. Nonetheless, despite this difference, once an arbitration agreement is formed, it is every bit as binding as a traditional arbitration agreement.

1.4. The Arbitral Tribunal

Once a dispute arises, any of the parties to an arbitration agreement may commence arbitration. Where the parties have agreed to an institutional arbitration, the rules of the arbitral institution will determine how the arbitration can be commenced, and usually require that claimant lodges a formal request for arbitration with the secretariat of the institution. In *ad hoc* arbitration, the claimant will transmit its request directly to the respondent.

Once the request for arbitration has been made, it is essential that a tribunal be constituted as quickly as practicable. Unlike in the context of court litigation, after all, where parties merely have their case to a judge who held that position before the parties' dispute, an arbitral tribunal does not exist until it is constituted by the parties.¹² The arbitration agreement determines how the tribunal will be constituted. If the arbitration agreement does not include any relevant provisions in this regard, the applicable institutional rules or the *lex arbitri* will determine the procedure of appointment. Parties usually opt for either a sole arbitrator or a tribunal composed of three arbitrators. If the tribunal is composed of

¹¹ The ICC standard clause refers to "all disputes arising out of or in connection with the present contract"; the LCIA standard clause refers to "any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination".

¹² A substantial amount of time may lapse between the request for arbitration and the constitution of the arbitral tribunal. Such a delay may prove detrimental to the interests of one or more parties. By way of illustration, the respondent may try to dispose of his or her assets. In such exceptional emergency situations, a party may need an urgent interim or conservatory measure before the arbitral tribunal is constituted. For this reason, many institutions have now introduced an emergency arbitrator mechanism, which allows parties to obtain interim relief from a special arbitrator before the arbitral tribunal is constituted.

three members, each party generally has the right to appoint one arbitrator, while the chair of the tribunal is appointed by agreement.¹³ Similarly, in case of a sole arbitrator, the parties need to reach an agreement on the appointment. In either case, if the parties cannot agree on an appointment, or one party refuses to make an appointment it is required to make, the *lex arbitri* (in *ad hoc* arbitration) and institutional rules (in institutional arbitration) provide mechanisms through which one or more arbitrators can be appointed by a State court or by an organ of the arbitral institution.

There is little doubt that the appointment of the arbitrators is the most important action that any party will take in the course of an arbitration. Unlike court litigation, after all, which occurs in accordance with predecided procedural rules, procedural decisions in arbitration will usually be left to the discretion of the arbitrators. In addition, while the decision of a judge can usually be appealed to a higher court, arbitration laws in most States allow almost no possibility of challenge to the substance of an arbitral tribunal's decision, even if it is demonstrably false. Consequently, when selecting an arbitrator, a party is in effect selecting not only the procedural rules in accordance with which the arbitration will occur, but even the substantive law that will be applied to the dispute. A poor choice of arbitrator can be the difference between winning and losing a dispute. In light of the importance of this decision, attorneys representing parties in an arbitration will, when the amount in dispute justifies the expense, research potential appointees in order to determine the best individual to appoint.

In most jurisdictions parties are left free to decide who to choose as an arbitrator, with no particular legal or formal requirements being imposed by the *lex arbitri*. The arbitrator, for example, generally need not be a lawyer, or meet the requirements for election to a judicial post at national level. In practice, however, it remains relatively rare for a non-lawyer to be appointed as an arbitrator unless specific technical or commercial knowledge on the part of the arbitrator is desirable. However, unlike litigation in courts, where parties must accept the judge they have been assigned, the freedom granted to parties to select their own arbitrator means that if parties believe that commercial or technical knowledge will be more important for the correct resolution of their dispute than will legal expertise, they are free to appoint a non-lawyer who has this type of expertise.

Even though arbitrators are appointed by the parties, arbitrators must be both independent and impartial in the exercise of their duties. This means that they must not have significant connections to the parties, which might influence their decision in the case, and they must not have views regarding the parties or the dispute that will lead them to decide the dispute on a basis other than the facts and the applicable law. If an arbitrator fails to be either independent or impartial, any party may challenge their appointment and request either that their appointment be denied, or that they be removed from the tribunal.

As it would be unreasonable to expect parties to be aware of every aspect of an arbitrator's life, arbitrators have an obligation to disclose to all the parties, and not merely to the party that is considering appointing them, any circumstances which may give rise to an appearance of bias or partiality. The specific requirements regarding what must and need not be disclosed will be determined by the applicable law and any applicable institutional rules. Importantly, however, it is not enough that arbitrators are, as a matter of fact, independent and impartial. Arbitrators must also *appear* to be independent and impartial. Consequently, an arbitrator may not refuse to disclose something merely because he/she believes it does not affect his/her independence or impartiality, but must instead consider the impact it may have on his/her *appearance* of independence and impartiality. Similarly, an arbitrator may be removed from or denied appointment to a tribunal even where the

¹³ In this context, the party-appointed arbitrators are usually entrusted with the task of selecting the third arbitrator (chair or umpire), who serves as president of the tribunal.

relevant court or arbitral institution believes that the arbitrator is, as a matter of fact, genuinely independent and impartial, so long as evidence exists that would sufficiently justify the challenging party doubting the arbitrator's independence or impartiality.

Institutional rules and arbitration laws do not generally spell out the specific powers afforded to arbitral tribunals, instead allocating to the tribunal a general power to determine the dispute brought before it, so long as it remains within the boundaries of the arbitration agreement. Unlike a court, that is, which receives its authority directly from the State, an arbitral tribunal only has the power that it has been given by the parties involved in the arbitration. Consequently, it may not determine any issue not covered by the arbitration agreement, even when doing so would be more efficient than requiring that issue to be determined in a separate court proceeding. Similarly, the tribunal has no power over individuals not party to the arbitration agreement, even where the participation of those individuals in the arbitration is essential for the arbitration's successful function. In arbitration-friendly jurisdictions, however, State courts will use their own powers to assist arbitrations, undertaking those actions that tribunals themselves cannot perform.

1.5. Arbitral Proceedings

While there are no specific procedures that must be used in an arbitration, so that an arbitration may or may not resemble court litigation in format, arbitral proceedings are fundamentally equivalent to judicial proceedings in terms of the binding effect of any resulting decision. However, while the procedural rules used in State court litigation will to a significant degree be fixed, often by statute, the conduct of arbitral proceedings is principally dependent on party agreement. Consequently, so long as the procedures agreed between the parties do not undermine the fundamental fairness of the proceedings, parties may adopt almost any procedural rules they wish. This procedural freedom is arguably the greatest benefit that arbitration provides.

This procedural freedom is reflected in most (although not all) national arbitration laws, as well as in the UNICTRAL Model Law, which do not generally provide for specific timelines within which parties must submit statements of claim or defence, hold hearings, or conduct any other aspects of the arbitral process. Indeed, even institutional arbitration rules, which are developed by arbitral institutions precisely to provide a default format for arbitrations, and so do specify deadlines and other procedural requirements, overwhelmingly make these requirements subject to party consent, allowing parties to adopt their own preferred rules whenever they believe the default rules are inappropriate.

This said, however, the rules adopted by arbitral institutions play an important role in the conduct of institutional arbitrations, both because certain rules may be mandatory for any arbitration held at the institution, and because default rules are often left unchanged. Some leading institutions, for example, have as a mandatory requirement that before any action is taken on the substance of an arbitration, the arbitrators and the parties must draw up what is referred to as "terms of reference" for the arbitration, identifying the key substantive points the arbitration will address, as well as the primary deadlines and other agreed procedural rules.¹⁴ The purpose of the terms of reference is to ensure that all parties, arbitrators and counsel have shared expectations upon commencing the proceedings, thereby avoiding difficulties during the proceedings, as well as reducing the likelihood of subsequent challenges to any resulting arbitral awards. While the use of mandatory "terms of reference" is a minority practice, many arbitrators will commence proceedings by holding discussions with parties and counsel, in order to secure agreement

¹⁴ E.g. ICC Rules, Article 23(1).

on the procedural rules to be used in the arbitration. The tribunal will then issue a procedural order, specifying the agreed procedural rules, thereby again ensuring shared expectations amongst all participants in the arbitration.

While as a formal matter an arbitration is controlled by the parties, and it is therefore the parties who possess the right to decide the procedures to be used in the arbitration, as a matter of practice such decisions are instead often made by the arbitrators. Both parties and counsel, after all, may be less experienced in arbitration than the arbitrators, and so willing to defer to their experience. In addition, by the time a request for arbitration has been made, parties and counsel are focused on winning their dispute, meaning that each will likely approach procedural issues with a view to securing a procedural advantage, thereby making agreement on important points less likely. Finally, since it is the arbitrators who will ultimately decide the dispute, it will often be seen as self-defeating to force the arbitrators to work in accordance with rules they have opposed, as it increases the possibility that they may not be able to perform their work to the highest of their ability.

This said, however, in determining the conduct of the proceedings, arbitral tribunals will usually consult with counsel and the parties, rather than merely issue orders. For this reason, as mentioned above, many arbitrations will commence with case management conferences, with the objective of determining the procedural timetable of the arbitration. However, if agreement cannot be reached through discussion, the arbitrators, as the ultimate representatives of the parties in the dispute resolution process, will determine the timetable and procedural rules

The merits of the case are commonly discussed both in written submissions and in one or more hearings, however this varies significantly, both in terms of local practices in particular jurisdictions, and in terms of what is justified by the case. An arbitration in which only a small amount of money is in dispute, for example, may be held without any hearing, or potential with a hearing but with no written submissions. On the other hand, a large and complex arbitration may involve several rounds of written submission and response submissions, followed by one or more rounds of hearings, and finally further post-hearing written submissions. Ultimately, the procedures used in an arbitration can be adapted to the dispute and the parties, so long as fundamental procedural fairness is maintained, and any applicable mandatory laws or rules obeyed.

One particular point regarding arbitration procedure that should be noted relates to the privacy and confidentiality of arbitration. Individuals new to arbitration often describe confidentiality as one of the primary features of arbitration, however the place of confidentiality in arbitration varies significantly between jurisdictions. There is little question regarding the “privacy” of an arbitral proceeding, in that it is uniformly accepted that individuals not parties to the arbitration agreement have no right to be present at an arbitral hearing. This contrasts markedly with what is often seen as the right of the public to attend judicial proceedings, but reflects the fact that ultimately an arbitral proceeding is not itself part of any State’s judicial process. Consequently, non-parties to the proceeding have no more right to access that proceeding than they do to access the personal offices of the individuals involved in the dispute.

The “confidentiality” of arbitration, however, is a broader concern, and relates not to attendance at arbitral proceedings, but to both the public accessibility of information about and arising from the arbitration, and to the right of parties and other individuals involved in an arbitration to release information about or arising from it. The confidentiality of arbitration varies significantly between States, with some adopting a rule that arbitration is inherently confidential, while others treat arbitration as not confidential unless it is covered by a confidentiality agreement between the individuals/entities involved. Consequently, it

is important to be aware of the laws of the seat of an arbitration regarding the confidentiality of arbitration if confidentiality is desired. Alternatively, arbitral institutions often include provisions in their arbitration rules providing for the confidentiality of arbitrations held under those rules, which are then binding on all individuals covered by the provision, regardless of whether confidentiality is guaranteed by the law of the seat or not.

1.6. The Arbitral Award

In general terms, an “award” is a decision of the tribunal, finally resolving one or all of the issues submitted to the tribunal by the parties. Importantly, however, while in most arbitrations only a single award will be issued, resolving all matters submitted to the tribunal, the tribunal has the power to issue more than one award at different stages of the arbitration. Awards issued in the course of the arbitration, resolving one by not all matters submitted to the tribunal, are referred to as “partial awards”. The final decision by the tribunal, resolving all remaining matters submitted to the tribunal, is referred to as the “final award”.

A further distinction must also be made, between an “award” and an “order”, as not every decision made by a tribunal constitutes an “award”. Fundamentally, an “award” must finally resolve a substantive matter submitted to the tribunal. An “order”, on the other hand, merely represents a decision by the tribunal as to how an element of the arbitration, or relating to the arbitration, will be addressed. This distinction is of paramount importance as awards can be challenged before the courts of the seat under set aside proceedings, or enforced in the seat or abroad. “Orders”, however, are usually both unenforceable and unchallengeable.

Two additional types of awards are also common in arbitral practice: “consent awards” and “default awards”.

Consent awards (or awards on agreed terms), occur when the parties to a dispute have reached a settlement agreement, and so no longer require the tribunal to resolve their dispute. Were they merely to terminate the arbitration, and enter into a settlement agreement, they would subject themselves to the risk of non-performance of the agreement by the other party. If this happened, they would be forced to litigate in State courts regarding the alleged non-performance, unless they included a new arbitration agreement in their settlement agreement. This situation obviously involves significant uncertainty, and a significant risk that the dispute will simply be protracted.

Alternatively, however, the parties can approach the arbitral tribunal and ask that it issue a “consent award” mirroring the terms agreed between the parties. Importantly, the tribunal retains the power to refuse to issue a consent award, even though such a refusal is rare in practice. This power, however, is essential to the consent award qualifying as an arbitral award, as it means that the consent award genuinely reflects a decision of the tribunal, rather than merely reflecting an agreement between the parties. As a result, a consent award will have the same legal status as any other award issued by a tribunal, and in particular can be enforced in State courts under the procedures for the enforcement of arbitral awards. As such procedures are generally far faster than litigation over an alleged breach of a settlement agreement, consent awards allow parties to settle their dispute, without depriving them of the security that an enforceable arbitration award provides.

A “default awards” is issued by a tribunal when one of the parties refuses to participate in the proceedings. Such a procedure is common in litigation in State courts, however an important difference exists in the context of arbitration. While State courts may often simply issue a default judgement when one party fails to participate in the proceedings,

declaring the other party to be successful, arbitrations must be procedurally fair to all parties if they are to result in an enforceable award. Consequently, a tribunal issuing a default award that merely declares that a party has lost the proceedings because it did not participate, risks the award being held unenforceable by State courts. Consequently, when a default award is sought by a party to an arbitration, the arbitral tribunal will usually require that the arbitral proceedings be held, even with the participation of only one party, and will attempt to ensure that the non-participating party's perspective is properly heard. At the conclusion of the proceedings, however, the tribunal may then issue an award, and so long as the party that chose not to participate in the proceedings received proper notice of the proceedings, and was otherwise given a fair opportunity to participate in them, that party's failure to participate will have no effect on the enforceability of the resulting award.

The *lex arbitri* typically sets forth some formalities for the rendering of awards by arbitral tribunals. The UNCITRAL Model Law requires, for example, that the decision must reflect the opinion of the sole arbitrator or the majority of the tribunal (in cases of panels of three or more);¹⁵ that the awards must be signed by all the arbitrators (if not, then reasons for omitting a signature must be duly stated);¹⁶ that it must include reasons, unless the parties have agreed that no reasons shall be given;¹⁷ and that it must state the date and the place that it was issued.¹⁸ Some States, however adopted different rules, and so a tribunal must be aware of the requirements of the law of the seat regarding the form of an arbitral award.

1.7. Enforcing and Challenging an Arbitral Award

When the award is not complied with voluntarily, the winning party needs to enforce it. Enforcement aims at ensuring that the award is executed: for example, if the losing party refuses to pay the sums that the arbitral tribunal has awarded, the award-creditor can obtain the money through a coercive enforcement procedure. National legal systems set forth procedures for the enforcement of domestic awards; however, in some cases, the debtor's assets are located abroad. In this case, the award must be recognised and enforced internationally. The regime of international circulation of awards is largely shaped by the 1958 New York Convention.

The New York Convention obliges States party to the Convention to recognise and enforce foreign arbitral awards. Recognition and enforcement are distinct, although in practice States execute foreign awards in a single procedure without specifically making a distinction. Recognition is a pre-requisite for enforcement and essentially demands an acknowledgement by the enforcing State that the award is indeed final and binding and thus gives rise to *res judicata*. Enforcement, on the other hand, involves a process whereby the foreign award assumes the same authority as a domestic award or judgment and is immediately executable against the losing party and his assets.

The New York Convention imposes certain limitations to its scope of application. The first limitation concerns the nationality of awards. The New York Convention distinguishes between domestic and foreign awards, obliging States to recognise and enforce only the latter. Foreign awards are: a) those rendered in the territory of a state other than the State of enforcement, as well as b) those that are "not considered domestic" in the State in which

¹⁵ UNCITRAL Model Law, Article 29.

¹⁶ UNCITRAL Model Law, Article 31(1).

¹⁷ UNCITRAL Model Law, Article 31(2). This, however, may prove detrimental at the enforcement stage, as some jurisdictions may not recognise awards which do not provide any reasoning for the decision.

¹⁸ UNCITRAL Model Law, Article 31(3).

enforcement is sought.¹⁹ The second limitation is that States may, when they join the New York Convention, declare that they will only recognise and enforce foreign awards from States who are themselves party to the New York Convention.²⁰ Thirdly, parties to the New York Convention also make a declaration that they will recognise and enforce only awards arising from commercial relationships, the meaning of “commercial” being determined by the law of the enforcing State.²¹

Article V of the New York Convention specifies the grounds for denial of recognition and enforcement. These grounds are overwhelmingly concerned with procedural matters, and no possibility is included in the Convention for substantive review of arbitral awards. The grounds for challenge (under paragraph 1) are as follows:

- a) The parties to the arbitration agreement were under some incapacity in accordance with the law applicable to them or, alternatively, their agreement to arbitrate is not valid under the law to which the parties are subjected or under the law of the country where the award was made (the *lex arbitri*);
- b) The losing party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;
- c) The award deals with a dispute that was not contemplated by the parties in their agreement to arbitrate or which did not fall within the express terms of said agreement, or it contains decisions on matters beyond the scope of the submission to arbitration;
- d) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place;
- e) The award has not yet become binding on the parties, or has otherwise been set aside or suspended by a competent authority of the seat in accordance with its laws.

Paragraph 2 of Article V includes two additional limitations to the enforcement of foreign awards, namely inarbitrability and public policy. Unlike the five limitations identified above, inarbitrability and public policy are assessed by reference to the law of the country where enforcement is sought. They do not provide a means by which State courts may act as appellate courts for arbitration awards, but do nonetheless allow States to consider issues other than those relating to the procedural aspects of the arbitration

Inarbitrability means that the dispute is not allowed to be resolved through arbitration; rather, the parties are legally obligated to submit their dispute to the competent State courts. Limitations to arbitrability usually derive from a legislative decision that a particular subject matter is of significant public interest, as is the case for disputes falling within the sphere of criminal law, or that a particular category of cases involves one party that is significantly weaker than the other, as is the case with consumer disputes. In such situations legislators have decided that it is important that disputes of this type be resolved through State courts.

Public policy considerations refer to the legal or cultural values of a State, although the precise meaning of the term, and which values it covers, are determined individually by each jurisdiction. Public policy issues may arise from the subject matter of the dispute, the conduct of the parties or some aspect or element in the arbitral process itself. Importantly, while the Convention does not require that States adopt any particular understanding of

¹⁹ New York Convention, Article I(1).

²⁰ New York Convention, Article I(3).

²¹ New York Convention, Article I(3).

“public policy” as the term is used in the Convention, States have overwhelmingly adopted the view that “public policy” under the New York Convention refers to “international” public policy, rather than what is referred to as “public policy” in the courts of the enforcement State. Consequently, this exception to enforcement under the Convention should only be invoked where the award in some way contravenes fundamental standards of international commerce, or the most fundamental values of the enforcement State.

While the losing party in an arbitration may choose to challenge enforcement of the award, it can also challenge the enforceability of the award through an action in the courts of the seat of the arbitration. This kind of challenge is known as an annulment procedure and is regulated by the *lex arbitri*, and although the New York Convention makes provision for awards to be annulled, it includes no provisions regarding the standards that must be used in annulment proceedings. Although the grounds for challenge can vary, depending on the applicable law, in most arbitration-friendly jurisdictions a mistake in the interpretation or application of law is not a valid reason for setting awards aside. Arbitral awards, therefore, cannot usually be challenged on the same broad grounds as State court judgments; on the contrary, the award may be annulled only in specific cases, mainly where provisions of procedural law have been violated. This approach is exemplified by the UNCITRAL Model Law, which limits the possibility of annulment to the following grounds:

- a) one of the parties was under some incapacity, or the arbitration agreement was not valid;
- b) the challenging party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;
- c) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside;
- d) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of the *lex arbitri* from which the parties cannot derogate, or, failing such agreement, was not in accordance with the *lex arbitri*;
- e) the subject-matter of the dispute is not arbitrable;
- f) the award is in conflict with public policy.

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2. PART B – ARBITRATION LAW AND PRACTICE IN THE EUROPEAN UNION AND SWITZERLAND

2.1. Overview of Arbitration in the European Union and Switzerland

Understanding how arbitration works requires familiarity with some basic concepts, which characterise this field of law. Therefore, this section offers a topic-by-topic analysis of certain primary elements of arbitration, allowing readers to familiarise themselves with the subject and to understand its operation. The overview also takes into account that the legal framework and practice of arbitration is not entirely uniform in Europe. Hence, an overview of the substance of a topic is provided, the study provides information on how the topic in question is implemented and applied in the Member States of the European Union and in Switzerland. The study thus offers an informative discussion on the main guidelines of arbitration in general, but also includes insights as to how such legal concepts work in the context of every European jurisdiction, as well as critical insights as to how different national approaches influence arbitration positively or negatively.

2.1.1. Scope of application (international versus domestic)

A common distinction in arbitration law is the one between domestic and international arbitration. Whenever an international legal relationship is involved, parties often choose to resort to arbitration, as the involvement of national State courts could be undesirable for several reasons, such as local protectionism. However, arbitration is also commonly used where the underlying legal relationship is purely domestic: nationals of a certain State could decide to submit to arbitration for a host of reasons, such as celerity, expertise, confidentiality or the possibility to adapt the rules of procedure to the specific needs of the case at hand.

The meaning of the distinction between domestic and international arbitration largely depends on the adopted point of observation. It is undeniable that international arbitration is in many respects different from domestic arbitration: in light of the current evolution of this legal phenomenon, international arbitration is now described by some commentators as a transnational system of civil and commercial justice, an autonomous legal order largely independent from national systems. However, from the point of view of States, such a notion of international arbitration is not generally recognised in national legislation (with some notable exceptions, such as France): in this context, arbitration is usually seen as a private mechanism of dispute resolution, which is seated in one particular jurisdiction and regulated by its national laws. Therefore, it is important to analyse the scope of these national rules in light of the distinction between international and domestic arbitration.

In some jurisdictions, the arbitration law does not distinguish in any way between domestic and international arbitration. This approach leads to a simple result: whenever the arbitration is seated in that State, it is subject to the same national rules, irrespective of whether the underlying legal relationship is international or domestic in nature. In other words, under this approach, there is no difference between international and domestic arbitration, the only applicable criterion being whether the arbitration is domestic or foreign. In the former case (i.e. when the proceedings are seated in the State), the arbitration law of the State will always apply; in the latter case, on the contrary, the proceedings do not fall within the scope of application of national law. Foreign arbitration will only be relevant for the State inasmuch as national provisions of public international

law or international instruments (such as the 1958 New York Convention) provide for the recognition and enforcement of foreign arbitral agreements and awards.

On the contrary, some other jurisdictions differentiate between domestic and international arbitration. In other words, the fact that an arbitration is seated in the State is not enough ground to conclude that certain provisions will apply. Rather, it will be necessary to determine whether the case has certain elements of connection with a foreign State, according to which the proceedings can qualify as "international". Subsequently, the national arbitration law sets forth two separate regimes of arbitration: one to be applied when the proceedings are seated in the State but the dispute is purely domestic, and one to be applied when the dispute is based on an international legal relationship (for example, at least one of the parties is not a national of the State).

The UNCITRAL Model Law was conceived to harmonize national legislations in the field of international commercial arbitration and therefore only takes into direct consideration the situation where the arbitral dispute presents some international character. However, the contents of the instrument have a neutral character, as no provisions of the Model Law are structurally incompatible with domestic arbitration. In the words of the UNCITRAL Explanatory note, '(w)hile the Model Law was designed with international commercial arbitration in mind, it offers a set of basic rules that are not, in and of themselves, unsuitable to any other type of arbitration. States may thus consider extending their enactment of the Model Law to cover also domestic disputes, as a number of enacting States already have'.

European Union Member States and Switzerland

In Europe, different States take different approaches as to the distinction between domestic and international arbitration.

The majority of States does not distinguish between the two types of proceedings: Austria, Belgium, Czech Republic, Denmark, England and Wales, Estonia, Finland, Germany, Hungary, Ireland, Italy, Latvia, Lithuania, the Netherlands, Poland, Portugal, Scotland, Slovakia, Slovenia, Spain and Sweden follow this approach.

On the contrary, Bulgaria, Cyprus, France, Greece, Malta, Romania and Switzerland draw a distinction between international and domestic arbitration.

It is noteworthy that some national systems apply the same regime to both forms of arbitration, but also include some minor exceptions and adaptations for international proceedings. For example, under Belgian law, where none of the parties is Belgian or a Belgian resident they can agree to waive annulment/set aside proceedings before the courts, whereas if at least one of the parties is Belgian or a Belgian resident such a waiver is not possible.

In Portugal, the national law distinguishes between international and domestic arbitration on the basis of the criterion of "international trade interests"; however, the two regimes are substantially overlapping.

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2.1.2. Scope of application (commercial vs. other)

Not every dispute falling within the general limits of arbitrability shares the same nature; on the contrary, some cases are commercial in nature, whilst others cannot be qualified as commercial, although they involve economic interests. Although the specific definition of 'commercial' can change depending on the applicable substantive law, in general it is accepted that a relationship is commercial when it is based on a contract concluded between parties professionally operating on the market as merchants. On the other hand, a private law relationship does not usually qualify as commercial when is non-contractual in nature (for example, disputes on trusts) or when it is based on a contract concluded episodically by subjects not usually operating in that specific market.

In abstract, the distinction between commercial and non-commercial legal relationships could be relevant from many points of view, as far as arbitration is concerned. For example, the scope of application of a national arbitration law could be limited to commercial relationship only, so that parties to an economic legal relationship not qualifying as commercial cannot validly submit their disputes to arbitration. The rationale of such a legislative restriction could be to protect non-commercial parties, which could not fully appreciate the consequences of entering an arbitration agreement since they are generally less experienced than professional merchants. Alternatively, a legal system could admit arbitration of non-commercial disputes, but regulate it in a different way than commercial arbitration, thus taking into account the peculiarities of this type of dispute.

European Union Member States and Switzerland

The approach generally adopted by European States is that all disputes falling within the national boundaries of arbitrability can be resolved through arbitration, irrespective of their commercial or non-commercial nature. There are, nonetheless, some exceptions to this trend.

In Bulgaria, the arbitration law applies to international arbitration of commercial disputes and to domestic arbitration of commercial or non-commercial disputes. Under Article 286 of the Law on Commerce, a commercial transaction is defined as any transaction entered into by a merchant that is related to the business activity it carries out (all commercial companies are regarded as merchants). In addition, some contracts are always considered as commercial, such as the purchase of goods with the purpose of reselling.

In Cyprus, the Arbitration Law applies only to international commercial arbitration, whilst for domestic cases a separate regime is set forth.

In France, the international arbitration regime only applies to commercial cases, but this requirement must be interpreted extensively, as to also include consumer activities with a transnational nature (for example, the sale of stocks and other financial instruments).

In Hungary, arbitration is only possible where at least one of the parties is a person dealing professionally with an economic activity and the legal disputes is in connection with this activity: therefore, unlike most other European legal system, in this case the commercial qualification of the legal relationship has a fundamental impact on the limits to arbitrability.

In Lithuania arbitration is only possible where a commercial relationship is involved, but the boundaries of this notion are determined by the arbitration law in a broad way, encompassing "any controversy between the parties over issues of fact and/or law arising

out of contractual or non-contractual legal relationships, including, but not limited to, supply of goods or provision of services, distribution, commercial agency, factoring, lease, contracting, consulting, engineering services, licencing, investing, financing, banking activity, insurance, concession, creation and carrying out of joint ventures and any other industrial or business cooperation, compensation for damage caused through violation of rules of the competition law, agreements concluded based on public procurement, transportation of goods or passengers by air, sea and land”.

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2.1.3. *Ad hoc* vs. Institutional Arbitration

Arbitration is a system of dispute resolution where adjudicative functions are performed by private subjects: arbitrators are not tenured, nor they are part of a public office. As a result, unlike civil litigation, arbitration can exist without any permanent institutional framework: in the presence of a valid arbitration agreement, an arbitral tribunal can be constituted in order to resolve the dispute between the parties. As a consequence of this, the arbitral tribunal did not exist before it was formed by the parties, and will not exist after the end of the proceedings.

This basic form of arbitration, in which two parties agree on arbitral tribunal to decide their dispute, without the involvement of any arbitral institution, is commonly referred to as *ad hoc* arbitration: the Latin name alludes to the fact that the tribunal is not a permanent judicial body, but is constituted with the sole purpose of adjudicating a specific dispute. The underlying contractual framework is, in this case, extremely simple. When appointing the arbitrators, the parties enter into a contract (generally a mandate) with them: the private adjudicators take up the duty to adjudicate the dispute, usually in exchange for a sum of money.

As a technical matter, the consensual nature of arbitration means that arbitration proceedings can progress without any need for State court intervention. However, when certain pathological events occur, the arbitration cannot be started or continued without the support of a national judicial authority. For example, if the arbitration agreement confers on each party the right to appoint one arbitrator, but one of the parties refuses to do so for obstructionist purposes, it is necessary to find a means of appointing the arbitrator on behalf of the uncooperative party in order to commence the proceedings, appointment of that arbitrator by the cooperative party raising concerns about the fairness of the subsequent proceedings. Similarly, one party might need to challenge an arbitrator for lacking independence and impartiality: once again, it is necessary to resort to an external authority, in order to obtain a decision on the challenge.

These examples show that, in light of the temporary nature of the arbitral tribunal, arbitration sometimes needs external support: these supporting functions are normally performed by a judicial authority at the place where the arbitral proceedings are seated. In French, the national judge performing these functions is called the *juge d'appui* (supporting judge).

The above analysis demonstrates that, under particular circumstances, arbitration needs to rely on a pre-existent, permanent framework of support. In *ad hoc* arbitration, parties have no choice but to seek the needed support before the competent national Court; however, *ad hoc* arbitration is not the only available form of arbitration. In most jurisdictions, private arbitration institutions offer similar services of support to the arbitration proceedings. In this context, the adjudicative functions are still performed by a temporary arbitral tribunal: however, the administrative aspect of the proceedings is managed by a permanent, pre-existing private structure, which can provide support when necessary.

Every private arbitral institution publishes its set of arbitration rules, regulating the procedural development of the arbitration. When parties include the appointment of an arbitral institution in their arbitration agreement, they do not only submit to arbitration, but they also provide for the application of the rules of the selected institution. Therefore, in this context the supporting services will generally not be performed by a State court but by the institution itself. In this type of arbitration, normally called 'institutional' or 'administered', the underlying contractual framework is more complex: in addition to the contract with the arbitrator(s), parties also enter into a contract with the institution, which takes up the duty to support and administer the arbitral proceedings. Some arbitration institutions manage specific types of disputes and thus offer a specialist area of expertise; on the contrary, other bodies generally administer any kind of arbitration.

European Union Member States and Switzerland

The choice whether to resort to *ad hoc* or administered arbitration depends on the preference of the parties entering into an arbitration agreement. Although there is no statistical data in this regard, as it is impossible to know how many *ad hoc* arbitrations are conducted, practical experience indicates that there are jurisdictions in which *ad hoc* arbitration is common.

In addition, in some jurisdictions national law places limits on the ability to establish arbitral institutions. This is true in the Czech Republic, Greece, and Hungary. On the other hand, both Latvia and Slovakia are currently having difficulties due to the very large number of arbitral institutions in each State.

Some national laws are distinctive in their treatment of arbitral institutions. In Malta the Malta Arbitration Centre administers, alongside other forms of arbitration, arbitrations that take place under Malta's mandatory arbitration laws. In addition, the Registrar of the Centre has powers usually restricted to course, including the power to issue subpoenas to compel witnesses to give evidence or produce documents in a domestic arbitration. Under Romanian law, parties do not deviate from the arbitral rules of an arbitral institution without the institution's consent.

No State included in the Study forbids *ad hoc* arbitration, however some limits its effectiveness. Under Latvian law as it currently stands awards resulting from a domestic *ad hoc* arbitration cannot be enforced through Latvian courts. Under the law of the Czech Republic, a domestic arbitration agreement referring to arbitration rules other than those of a permanent arbitral institution established under Czech law (including the UNCITRAL Arbitration Rules) must have a copy of those rules attached.

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2.1.4. Arbitrability

Arbitration is a system of private adjudication substituting court litigation: although it is structurally similar to court proceedings, arbitrators are not State judges and they do not exert sovereign powers. Therefore, it is evident that arbitration cannot substitute any type of court proceedings: criminal cases, for example, must necessarily be dealt with by State courts, since the prosecution and sanctioning of crimes is an exclusive function of the judiciary. Similarly, whenever it is necessary to enforce a judgment requiring certain behaviours from one of the parties, the enforcement services provided by national courts and authorities cannot be replaced with arbitration, since they entail the exertion of coercive powers.

In light of this, every legal system limits the scope of application of the provisions concerning arbitration; in doing so, national lawmakers determine that arbitral tribunals can substitute State courts in certain areas of law, but not in others. The problem whether a certain dispute can be referred to arbitration is commonly referred to as 'arbitrability'. In other words, the concept of arbitrability divides all areas of law into two different domains: a first one, where State justice can be substituted with private adjudication, and a second one, where the courts of the State perform tasks which cannot be undertaken by private adjudicators.

The New York Convention deals with the problem of arbitrability in Article V(2)(a), according to which recognition and enforcement of an arbitral award can be refused if the subject matter of the dispute is not capable of settlement by arbitration. Therefore, the contents of national law relating to arbitrability are of extreme importance, not only because they determine what kind of disputes can be resolved through arbitration in a particular jurisdiction, but also because they can limit the international circulation of arbitral awards.

The boundaries of arbitrability are progressively expanding. This evolution finds several justifications: first of all, arbitration has affirmed itself as a reliable method of dispute resolution, even when the rules applicable to the case at hand are mandatory or fall within the national concept of public policy. In light of this, there is a transnational trend towards the progressive inclusion of new areas of law within the domain of arbitrability, such as competition law. However, the legal landscape in this regard is not completely harmonized: whilst some subject matters are almost universally considered arbitrable (such as monetary claims deriving from a commercial relationship) and other areas of law are clearly inarbitrable (such as criminal cases), different jurisdictions take different approaches, especially as far as 'grey areas' of uncertainty are concerned. However, some criteria are adopted by numerous national laws: in many cases, the dispute is deemed arbitrable inasmuch as it involves rights which the parties are entitled to dispose of. Conversely, disputes which are not capable of settlement are also not arbitrable.

European Union Member States and Switzerland

In Austria, the general rule is that pecuniary claims can be the subject of an arbitration agreement, although pecuniary claims arising from certain contexts, such as ones deriving from family law, are not arbitrable. Non-pecuniary claims are equally arbitrable, as long as the subject matter of the dispute is capable of settlement.

In Belgium, arbitrability covers any claim involving an economic interest, as well as claims not involving an economic interest but capable of settlement.

A similar approach is followed in Bulgaria, where pecuniary claims are arbitrable, whilst disputes involving personal non-transferrable rights or relating to public interests are not arbitrable.

Under Croatian law, the limits to arbitrability are not completely clear. However, a line of reasoning of the Supreme Court seems to exclude arbitrability when the dispute must be resolved through the application of mandatory norms.

A similar situation of uncertainty exists in Cyprus, where the arbitration law does not define clear boundaries to arbitrability; however, it is generally accepted that disputes relating to trade transactions or other similar commercial contracts can be referred to arbitration.

Under Czech law, arbitrability covers "all property disputes". This notion must be interpreted extensively, so as to encompass all contractual obligations as well as the determination of the existence of an obligation, provided that the requested determination affects the property rights of one of the parties.

The Danish position follows that in the UNCITRAL Model Law, allowing the submission to arbitration of any "legal relationships in respect of which the parties have an unrestricted right of disposition".

In England and Wales, the limits of arbitrability are not expressly defined, but they are commonly deemed to broadly encompass all matters affecting the civil (private) interests of the parties.

In Estonia and Portugal, the general rule is that parties have the right to submit to arbitration any dispute which they are entitled to dispose of, whilst disputes which are not capable of settlement are not arbitrable.

Finnish law broadly states that all civil and commercial disputes that can be settled by agreement are arbitrable.

A similar approach is adopted by the French civil code and by Italian, Dutch, Luxembourgish, Hungarian, Romanian, Slovak, Spanish and Greek law, pursuant to which all disputes relating to rights which the parties can dispose of are arbitrable.

Under German law, parties can arbitrate any economic claim or any non-economic claim capable of settlement.

Irish law does not contain any general rule, but rather enucleates some specific cases of inarbitrability, such as, for example, labour disputes.

In Latvia, arbitrability extends to any dispute relating to civil matters, with some specific exceptions, such as disputes relating to changes in the registration of civil status deeds or certain disputes between employer and employee.

Under Lithuanian and Maltese law, all disputes are in principle arbitrable, save for specific exceptions. Such exceptions mostly refer to claims of non-disposable rights, or to claims involving a collective social interest that transcends the position of the single plaintiff.

In Poland, the scope of arbitrability extends to all civil cases, i.e. cases involving relationships in the field of civil law. Therefore, unlike the vast majority of other European States, all civil law relationships, including those arising from family or inheritance relationships, are encompassed within the ambit of arbitrability.

Scottish law states that disputes can in general be arbitrated, unless they involve issues of public interest.

Under Slovenian law, economic claims can in general be arbitrated, whilst disputes of different nature, such as the ones relating to personal status or inheritance, are considered inarbitrable.

In Sweden, the main criterion to ascertain whether a claim is arbitrable is the capability of settlement.

In Switzerland the boundaries of arbitrability are very broad: it is generally accepted that the possibility to resort to arbitration can be limited only on grounds of public policy.

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2.1.5. Form of the agreement

Since arbitrators are private adjudicators, their jurisdiction generally derives from a free choice of the disputing parties. Whilst State courts exert a sovereign power and have, therefore, the authority to rule on any dispute brought before them and falling within their jurisdiction, arbitrators can only perform their functions if a valid arbitration agreement exists.

Access to State justice is commonly regarded as a fundamental feature of any national system: whenever a party has a substantive right, it also has the possibility to enforce it before the competent judicial authority. From this point of view, the arbitration agreement can be seen as an exception to the general rule of State courts jurisdiction: entering into an arbitration agreement has a fundamental effect on the procedural rights of the parties, as it deprives them of the possibility to access State courts. In other words, when parties conclude an arbitration agreement, they waive their right to resort to a State judge, in favour of a private adjudicator.

In light of the importance of such a decision, national legal systems generally set forth requirements relating to the form of an arbitration agreement. Pursuant to these provisions, the arbitration agreement must be concluded according to particular forms, which ensure certainty of contents and predictability of results.

The basic requirement in this regard is the written form: under many national laws, an arbitration agreement is only valid inasmuch as it has been concluded in writing. The main

problem with this requirement is that in the reality of civil and commercial relationships contracting parties enter into agreements through a wide range of means of communication, which sometimes makes it difficult to ascertain whether the written form requirements are met. The New York Convention partially takes this problem into account stating, at Article II(2), that the term 'agreement in writing' includes an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams. However, the recent evolution of technology make it possible for contracting parties around the world to communicate instantly with new instruments, such as, for example, an exchange of e-mail messages. In this regard, therefore, national systems are confronted with the challenge of taking technological change into account, in order to balance the traditional need for certainty with the new reality of business transactions.

A tacit acceptance of arbitration can take place if, in the absence of a valid arbitration agreement in writing, one of the parties initiates arbitration proceedings and the other one participates in the arbitration without objecting to the arbitral tribunal's jurisdiction. In general, this is considered as a waiver of the procedural right to obtain termination of the arbitration on grounds of absence of an agreement. However, this is not usually tantamount to the conclusion of an arbitration agreement, as the non-objecting party's decision to submit to arbitration does not extend to any dispute arising in respect of the same legal relationship, but is limited to those particular proceedings where the objection was not raised.

European Union Member States and Switzerland

The written form requirement is included in the UNCITRAL Model Law and many European jurisdictions (including Spain, Ireland, Belgium, Germany, Austria, Croatia, Hungary, Bulgaria, Poland and Lithuania) have modeled their national arbitration legislation on this instrument. However, in some jurisdictions (such as France, Scotland or Denmark) the agreement can also be concluded in oral form, as long as there is adequate evidence of the parties' intention.

Some jurisdictions expressly refer to new methods of communication and specify that these instruments meet the requirement of 'agreement in writing'.

Austrian, Czech and Cyprian law expressly refer to faxes, telex and e-mail.

England, Wales and Northern Ireland similarly takes a broad view as far as the written form requirement is concerned. Section 5 of the 1996 Arbitration Act encompasses any agreement the terms of which are "evidenced" in writing.

Under Swiss law, the written form requirement is satisfied by any kind of electronic or hardcopy communication resulting in a written text.

Croatian law acknowledges the validity of an arbitration agreement where one of the parties proposes arbitration and the other one does not object to the proposal, and also encompasses documents such as a bill of lading.

In the Netherlands, the Arbitration Act was adopted before the advent of e-mails and other similar forms of communication, but it is commonly accepted that any form suffices as long as there is a record of it, including agreements by incorporation. The new version of Article 1021, to enter into force on 1 January 2015, expressly recognises the validity of an arbitration agreement evidenced by electronic means. Whilst this provision is not likely to change the practical situation radically, as Dutch courts already recognise the validity of electronic agreements, the reform is a useful adaptation to the new reality of telecommunications.

Italian law includes means of 'tele-transmission' in the written form requirement, thus incorporating all commonly used modern technologies.

In Germany, under § 1031 ZPO, bills of lading and incorporation by reference are considered valid methods of conclusion of arbitration agreements.

In contrast, the validity of incorporation by reference is not recognised in the Czech Republic.

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2.1.6. Arbitrator's qualifications

Since arbitrators are private adjudicators, they are not tenured members of a judicial body, nor do they exert public authoritative powers. This aspect is commonly perceived as a key feature of arbitration: the flexibility of this system of dispute resolution depends, to a large extent, on the fact that parties are free to appoint any private subject as an arbitrator and can, therefore, make their choice in light of the particular needs of the case at hand. In other words, parties entering an arbitration clause are largely left free to select the arbitrator(s) they deem most suitable for their dispute, and to reach an agreement on the particular characteristics and qualifications that their adjudicator(s) must have.

National legal systems generally afford contracting parties a high degree of autonomy in this regard; however, in light of the importance of the task that arbitrators must perform, some minimal mandatory qualifications are sometimes imposed by the applicable arbitration law, in order to ensure that certain minimal standards are met by the arbitral tribunal. It is noteworthy that national arbitration laws are not the only source potentially imposing mandatory qualifications: many institutional arbitration rules follow a similar approach and set forth particular requirements for the members of arbitral tribunals.

European Union Member States and Switzerland

Some national laws do not set forth any particular requirement or qualification for arbitrators: therefore, in these jurisdictions, the criteria of selection depend entirely on party autonomy. This is the situation in Austria, Belgium, Bulgaria, Croatia, Cyprus, Denmark, England and Wales, Finland, France, Germany, Greece, Ireland, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovenia and Switzerland.

In the Czech Republic, Italy, Scotland, Spain and Sweden the arbitration law does not provide for any specific requirement, but expressly states that arbitrators must have full legal capacity.

In Estonia, the Bar Association Act adds a further requirement: only qualified attorneys can act as arbitrators.

In Hungary, those under 24 years of age, those who have been barred from public affairs by a non-appealable court judgment, those who have been placed under curatorship by the court with a non-appealable judgment and those who have been sentenced to imprisonment to be executed cannot act as arbitrators.

In Latvia any person may be appointed as arbitrator, as long as that person is at least 18 years old, has a good reputation, possesses a solid legal education, has at least three years professional experience and has no criminal record for crimes requiring intent.

In Slovakia, arbitrators are required to have a clean criminal record and to have 'adequate experience to perform the function of an arbitrator'. This second requirement is generally ignored, due to its vague and indeterminate nature.

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2.1.7. Independence and Impartiality

Since arbitrators perform adjudicatory functions, it is fundamental that they are independent and impartial: these duties are generally enshrined in all national arbitration laws.

These two concepts are interrelated but not entirely overlapping. "Independence" refers to the objective relationship between the arbitrator and the parties. For example, when the arbitrator is a shareholder of one of the disputing parties, or is linked to a party by a family relationship, there is a clear risk that she may be influenced in the performance of her duty by that relationship. She is, therefore, regarded as lacking the necessary independence to serve as an arbitrator. "Impartiality", on the other hand, focuses on the subjective mindset of the arbitrator with respect to the case pending before him. An arbitrator should always decide a case on its merits, without being influenced by the identities of the parties and without deciding any issues before the parties have been afforded an equal right to present their arguments.

As this indicates, independence and impartiality are closely related concepts, and indeed are ultimately merely different means of addressing the same problem: ensuring that the arbitrator reaches a decision on the merits of the case. An evaluation from the perspective of "independence", however, requires merely that a relationship exists between the arbitrator and a party, and does not require any demonstration that the relationship will indeed affect the arbitrator's decision – the mere existence of the risk is regarded as sufficient. By contrast, an evaluation from the perspective of "impartiality" requires that a conclusion be drawn about the subjective mindset of the arbitrator. The perceived impartiality may be created by the existence of a relationship with one of the parties, or may arise in some other way – all that matters is that there is adequate evidence to conclude that the arbitrator will indeed not decide the dispute on its merits, but will be influenced by some extraneous consideration.

Importantly, however, in line with the maxim that "Not only must justice be done; it must also be seen to be done", it does not suffice that arbitrators are, as a matter of fact, impartial and independent. Rather, they must also *appear* to be so. Consequently, national

laws and institutional rules conventionally require only that “justifiable doubts” exist as to the independence or impartiality of an arbitrator, in order for that arbitrator to be precluded from deciding a dispute. Actually proof of a lack of impartiality or independence is not required.

Breach of the duties of impartiality and independence is sanctioned by national arbitration laws in two main ways. Firstly, arbitrators can be challenged and subsequently removed from an arbitration. Challenged proceedings can be brought before State courts, or before the arbitral institution managing the proceedings, if the arbitration is administered. Secondly, an award rendered by arbitrators who were in breach of their duty of independence and impartiality can be set aside (i.e. declared to be invalid by the courts of the seat of the arbitration) or refused enforcement.

European Union Member States and Switzerland

Arbitrators can be challenged for several reasons relating to independence and impartiality. Different national arbitration laws follow diverging approaches in this regard: in some cases, the law simply states that arbitrators can be challenged whenever a situation occurs that gives rise to justifiable doubts of independence and impartiality. In other cases, the law expressly enumerates all of the circumstances deemed to potentially give rise to doubts in this regard; as a consequence, cases which do not fall within the scope of any of the specific provisions set forth in the arbitration act cannot be invoked as grounds for challenge.

The first approach is followed by the UNCITRAL Model Law and can therefore be found in countries adopting this instrument, such as Spain, Ireland, Belgium, Germany, Austria, Croatia, Hungary, Bulgaria, Poland and Lithuania. A similar solution is implemented in France.

On the contrary, in Romania, Italy and Sweden the grounds for challenge are specifically enumerated.

As for the possibility of setting the award aside, it could be argued that an arbitral tribunal acting in breach of its obligations of impartiality and independence has infringed the general duty of fairness towards the parties. On such grounds, the award could be challenged: a typical example in this regard is Section 68 of the 1996 Arbitration Act of England and Wales.

In Finland the fact that a challenge of arbitrators has been wrongly dismissed is in itself enough ground to set the ensuing award aside.

In addition, it is standard under national arbitration laws that an award can be challenged when it is the result of fraud or corruption, although obviously not every breach of the duty of independence and impartiality entails such crimes.

Furthermore the UNCITRAL Model Law and many institutional arbitration rules implement a duty of disclosure: when accepting their appointment, arbitrators must declare all circumstances that could possibly give rise to suspects as far as independence and impartiality are concerned. The use of disclosure aims at ensuring that parties are made aware of all relevant circumstances at the outset, and therefore are given an acceptable opportunity to raise objections to an arbitrator.

The extent of the duty of disclosure of arbitrators is currently debated: the 2004 IBA Guidelines on Conflicts of Interest in International Arbitration provide some useful guidance by listing possible circumstances to be taken into account and subsequently disclosed when considering an appointment as an arbitrator.

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2.1.8. Competence-competence

Arbitral tribunals derive their jurisdiction from the consent of the parties: through an arbitration agreement the litigants accept to refer their dispute to the decision of private adjudicators, instead of a State court. The arbitration agreement is usually concluded in the form of an arbitration clause: when concluding a contract, the parties include a clause pursuant to which all disputes arising out of or in connection with the contract, or a specified subsection of such disputes, must be resolved through arbitration.

However, the arbitration agreement is not a mere clause of the main contract: it constitutes a distinct legal relationship, related to but independent from the principal contract it refers to. This doctrine, commonly referred to as separability, has a fundamental consequence: the validity and the effects of the main contract must be evaluated separately from the validity and the effects of the arbitration agreement. For example, it is possible that the arbitration agreement is valid, but the underlying main contract is for different reasons invalid: as a result, the arbitral tribunal has jurisdiction, but the claims based on the main contract must be rejected. On the contrary, it is also possible that the main contract is valid, but the arbitration agreement is not: in this case, the claimant will have no choice but to resort to a competent State court, as the arbitral tribunal has no jurisdiction to hear the case.

There is no doubt that where a valid arbitration clause exists, the arbitral tribunal has jurisdiction to decide disputes arising out of the main contract and covered by that clause. However, it is possible that the respondent in the arbitration proceedings will raise objections relating not only to the main contract, but also to validity or scope of the arbitration agreement. For example, the respondent might object that the arbitral tribunal has no jurisdiction to hear the case because the arbitration clause was not validly incorporated in the main contract, or is not binding on the parties for another reason. In this case, which frequently occurs in practice, it is necessary to resolve the problem whether the arbitral tribunal has the authority to decide on its own jurisdiction, or whether the question must be referred to a State court having jurisdiction to hear claims relating to the arbitration agreement.

The majority of modern national systems resolve this problem by implementing the system of *competence-competence*, according to which the jurisdiction of arbitral tribunals extends to questions relating to the validity of the arbitration agreement. In other words, when an arbitration agreement invests arbitrators with the power to decide a dispute, this power automatically encompasses questions of validity of the arbitration agreement as well. This

basic mechanism enables arbitrators to decide the cases pending before them irrespective of whether the respondent only objects to the counterpart's substantive claim, or also challenges the jurisdiction of the tribunal. However, the detailed implementation of this system varies significantly in different legal systems.

The *competence-competence* doctrine always produces a positive effect: it enables the arbitral tribunal to take decisions as to the validity of the arbitration agreement. In this regard, European jurisdictions adopt a fairly uniform approach.

However, some national laws also provide for a negative effect, pursuant to which State courts have no jurisdiction to evaluate the validity of an arbitration clause. In other words, in countries where the *competence-competence* principle produces negative effects, State courts are in principle precluded from deciding on the arbitral tribunal's jurisdiction. The negative effect of *competence-competence* is a typical example of what is termed an "arbitration-friendly" provision, as it preserves the possibility for arbitrators to rule on their own jurisdiction without the risk of interferences from national courts.

European Union Member States and Switzerland

European legal systems can be classified under three different models, as far as the *competence-competence* principle is concerned. A first group of countries only recognizes the positive effect of *competence-competence*: as a result, arbitrators can rule on their own jurisdiction, but parties are also free to bring a claim before State courts, questioning the existence and the validity of the arbitration agreement. Examples in this regard are Finland and Sweden.

In other systems, the effect of *competence-competence* is broader, even if it does not encompass a full negative effect: State courts can assess the existence and the validity of the arbitration agreement, but if the arbitral tribunal has been constituted they can do so only as an incidental issue. In other words, when a claimant brings an action before a State court and the respondent objects to the court's jurisdiction by alleging that a valid arbitration agreement exists, the seized court always has the power to decide on the existence and validity of the arbitration agreement (subsequently referring the parties to arbitration, where appropriate). However, parties are not always free to initiate an autonomous dispute, focusing on the existence of a valid arbitration clause as a principal subject matter: they can do so if no arbitral tribunal exists, but they are prevented from doing so if an arbitration tribunal is already constituted. Examples in this regard are Germany and Italy.

Finally, some States recognize a full negative effect of *competence-competence*: a typical example in this regard is France, where national courts are precluded from deciding on the arbitral tribunal's jurisdiction, apart from the residual case where the arbitral tribunal is not yet seized and the arbitration agreement is manifestly null and void. In this case, a State court can only examine the problem of the existence and validity of the arbitration agreement as an incidental question, and must limit its evaluation to a *prima facie* assessment of the problem. In other words, the national Court will not review the existence of a valid arbitration clause in full detail, but will simply evaluate whether the agreement is manifestly non-existent. In all cases where the agreement passes this basic judicial test of existence, all other determinations fall within the exclusive jurisdiction of the arbitral tribunal.

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2.1.9. Provisional Measures

Similarly to State court litigation, arbitration implements the principle of due process of law and affords all parties a full right to be heard. Therefore, and although celerity is commonly perceived as a key advantage of arbitration, the process which leads to the decision of the case through the award requires some time. During this period of time, it is possible (and empirically frequent) that parties need provisional relief, in order to ensure that their substantive rights are not frustrated during the wait for the final decision. Such a provisional relief can differ in nature: in some cases, parties need a conservative measure, aimed at avoiding detrimental actions or events. For example, a creditor might apply for a freezing of the debtor's assets, in order to ensure that the enforcement of the future award is successful. In other cases, it could be necessary for the claimant to anticipate the effects of the future award, such as the payment of a claimed sum of money, in order to avoid irreparable prejudice.

The need for provisional or interim measures can arise indifferently, irrespective of whether parties have concluded an arbitration agreement or not. However, in the presence of an arbitration agreement, an additional problem exists: the party in need of a provisional measure needs to decide whether to apply for it before the arbitral tribunal, or before the competent national court of the State where the arbitration is seated or where the interim measure must be enforced. In this regard, national approaches can be widely divergent.

A first possible approach is to enable parties to seek for interim relief before both the State courts and the arbitral tribunal. In some cases, parties could prefer to resort to the arbitral tribunal, as involving a State court could entail waiving some of the key advantages of arbitration, such as confidentiality of a specific technical expertise of the arbitrators, which national judges might not possess. In other situations, it could be preferable or even unavoidable to resort to a State court. For example, in some cases the measure needs to be issued *ex parte* (i.e. without the involvement of the respondent), in order to ensure its effectiveness: therefore, in circumstances like the freezing of a debtor's assets, the claimant must file the application before a State court, since arbitrators cannot generally have *ex parte* contacts with the parties. In other cases, interim relief might be needed before an arbitral tribunal is constituted: as a result, in the meantime, parties have traditionally no choice but to resort to State judges.

A recent evolution in this regard is the introduction of emergency arbitration proceedings by many arbitral institutions: under these rules, parties can access an accelerated procedure, leading to the appointment of an 'emergency arbitrator' with the sole duty to decide on the interim claim. However, when parties have provided for an *ad hoc* arbitration, or have selected an institution whose rules do not provide for an emergency arbitration procedure, applying for provisional relief before a national Court might be the only available option.

European Union Member States and Switzerland

In light of the above situation, most European jurisdictions leave the parties free to decide whether to apply for interim relief before a national court or before the arbitral tribunal. However, there are significant exceptions.

In Italy, under Article 818 of the Code of Civil Procedure, arbitrators cannot grant interim measures. Therefore, even if parties have concluded an arbitration agreement, they must apply for provisional measures before the national Court which would have been competent on the merits in the absence of the agreement. The only exception to this general rule is the arbitral power to suspend the deliberation of the general meeting in company law disputes.

Similarly, under Czech and Romanian law, provisional measures must be requested before a State court.

In Greece, arbitrators can issue provisional measures only if the case is international.

In Luxembourg, the arbitral power to grant interim relief exists, but it is extremely limited in practice.

In some cases, the party against whom an interim measure has been issued does not voluntarily comply with it. Arbitrators can never provide executory relief, to compel the party to comply with the measure, as the enforcement of the measure entails the use of sovereign coercive powers. Therefore, in all jurisdictions where arbitrators have the power to issue provisional measures it is necessary to determine how these can be enforced. In this regard, different European States adopt diverging solutions.

Some national systems provide for a judicial mechanism of assistance. In this case, national courts and other enforcement authorities can assist the party in need of interim relief and provide the needed executory relief. This is the case in the vast majority of European States, including Austria, Bulgaria, Croatia, Cyprus, England and Wales, Estonia, France, Germany, Hungary, Lithuania, Luxembourg, Poland, Slovenia, Sweden and Switzerland.

In other cases, the national arbitration law does not provide for such a possibility: therefore, although arbitrators have the power to issue interim measures, the latter can produce the desired effects only in case of spontaneous compliance, or in cases where the measure is by nature self-executing and does not require coercive enforcement (an example in this regard could be a measure suspending the legal effects of a company deliberation). This is the case in Denmark and Latvia. In Denmark, however, parties can set forth the consequences of non-compliance in the arbitration agreement, providing for example that the party disregarding the order must pay damages, or that the tribunal can draw adverse inferences from the obstructionist behaviour of the party which does not comply with the order.

In Slovakia, although the possibility to seek enforcement of an arbitral interim measure before a State court is not structurally impossible, there are no reported cases of successful enforcement.

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2.1.10. Setting aside of awards

Finality is one of the primary benefits of arbitral awards; the decision of the arbitrator(s) is binding on the parties and should not, in principle, be revisited. This is a major difference between arbitration and court litigation: unlike first instance court decisions, arbitral awards cannot generally be appealed even if they are demonstrably mistaken.

The reason for this feature is to be found in the structure of arbitration: when entering an arbitration agreement, parties definitively waive their right to access state courts in favour of the jurisdiction of the arbitral tribunal. Therefore, national legal systems usually deem it inappropriate to allow for a full review of the arbitral award, as this would be tantamount to a *de facto* nullification of the waiver entailed in the arbitration agreement. In other words, the parties would have no incentive to conclude an arbitration agreement in the first place if they knew that the contents of the award could be freely re-argued before a State court. Moreover, an extensive judicial review of the merits of the decision would be incompatible with the idea of arbitration as a rapid method of dispute resolution: if the award could be appealed on the same grounds as a state court judgment, parties might have to wait a long time before they could rely on a final decision with *res judicata* effects.

European Union Member States and Switzerland

The above analysis does not mean that awards can never be challenged; on the contrary, all national systems provide for limited grounds of appeal of the arbitral decision. However, these grounds are commonly not as extensive as the grounds for appeal against a court judgment: rather than intruding in the arbitrators' decision on the merits of the case, they focus on specific procedural flaws, in light of which the award must be set aside. The UNCITRAL Model Law exemplifies this approach. Under the Model Law and the many national laws referring to it, an award can firstly be set aside if the arbitration agreement was invalid or if one of the parties was under some incapacity when the agreement was concluded. Secondly, the award can be challenged if the right to be heard of the appealing party was violated: typical examples in this regard are the cases where the party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings. Thirdly, an award dealing with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or containing decisions on matters beyond the scope of the submission to arbitration can be set aside. Fourthly, the award can be challenged if the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or with the applicable law. Fifthly, the award can be set aside if the subject matter of the award is not arbitrable according to the national law of the seat of arbitration. Finally, an award can be challenged if it is in conflict with the public policy of the State; although this ground for challenge relates to the contents of the award, the notion of public policy is usually interpreted restrictively (with some exceptions, such as Romania) and only encompasses the fundamental principles and values of certain legal systems.

In line with this standard, awards can be only challenged for procedural reasons (often with the addition of public policy) in Austria, Belgium, Bulgaria, Croatia, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Lithuania, the

Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and Switzerland.

In addition to these commonly used 'procedural' grounds, some national systems add 'substantive' grounds, i.e. reasons for appeal relating to the merits of the decision made by the arbitral tribunal. However, even when this is done the possibility of appeal is limited and does not usually encompass errors in the assessment of the facts of the case (*errores in facto*).

Rather, some jurisdictions afford the parties the possibility to appeal the award on point of law (*errores in jure*): this is the case in England and Wales. However, parties can waive their right to appeal on such grounds in the arbitration agreement. Moreover, an appeal can only be made with the consent of all the parties or with leave of the court. In turn, leave of the court is granted only in very restricted situations. The mistake of law must be a mistake regarding the law of England and Wales for a court in England and Wales, or the law of Northern Ireland for a court in Northern Ireland. In addition, under Article 69(2) of the Act, the court must find that "the determination of the question will substantially affect the rights of one or more of the parties (...), that the question is one which the tribunal was asked to determine...the decision of the tribunal on the question is obviously wrong, or (...) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and...that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question." Consequently, while it is possible to appeal questions of law under the English Arbitration Act, successful appeals are rare.

A similar solution is adopted in Scotland, where the law provides for a non-mandatory appeal on points of Scots law.

In Italy, an appeal on point of law is only possible inasmuch as parties have expressly provided for it in their agreement.

Malta is in this regard an exception, as an appeal is to a certain extent possible both on point of fact and on point of law.

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2.1.11. Consumer Arbitration

Consumer contracts are, in some respects, different from common civil and commercial relationships, since the consumer is a non-professional contracting party acting from an economically disadvantaged bargaining position. As a consequence, the content of consumer contracts is usually not drafted through a balanced negotiation between the parties, but rather derives from a unilateral decision of the professional counterpart of the consumer. In other words, consumers have usually no choice but to accept the terms and condition of the contract they have been offered, or to avoid the conclusion of the contract

altogether. For these reasons, most national legal systems set forth a specific legal regime for consumers, in order to protect the weak, non-professional party against its counterpart. In light of the above analysis, it is necessary to determine whether arbitration is compatible with consumer contracts. One of the main problems in this regard is that the parties to an arbitration agreement waive their fundamental right to access State courts; therefore, arbitration is usually possible only when all involved parties have consented to it. Since consumers have no particular bargaining power, the use of arbitration in this field entails the risk that consumers are unconscionably forced to waive their right to bring a claim before a State court in order to conclude the contract they are interest in.

European Union Member States and Switzerland

European legal systems usually take into consideration the concerns expressed by the Court of Justice of the European Union as to the conscionable choice of consumers to submit to arbitration and thus set forth some special provisions in this regard. Two approaches are mainly followed: the first possible solution is to prevent consumer arbitration agreements in the form of arbitration clauses. In jurisdictions falling under this model, consumers cannot submit to arbitration before a dispute has arisen: as a result, arbitration clauses included in consumer contracts are null and void. It is, however, possible to reach an arbitration agreement after the dispute has arisen (*compromis*). This is the case in Austria, Denmark, Finland, Ireland, Lithuania, Slovenia and Sweden.

In other legal systems, consumers are free to conclude an arbitration agreement before the dispute has arisen, but the arbitration clause is deemed abusive unless it has been individually negotiated and subscribed. In other words, the arbitration agreement is valid only where it has been subscribed separately from the rest of the contract it is attached to, thus demonstrating a specific will to submit to arbitration. The rationale of these provisions is to separate the consent to the main contract from the consent to arbitration, thus ensuring that consumers are not forced to waive their right to access State courts in order to conclude the main contract. This approach is followed in Croatia, the Czech Republic, Germany, Latvia, Poland and Romania.

In the Czech Republic, the arbitration clause, in order to be valid, also needs to provide the consumer with full information on its legal consequences (information on the arbitrator, the method of commencement and form of management of the arbitration proceedings, the remuneration of the arbitrator and the other expected expenses that may arise for the consumer during arbitration proceedings, the place of the arbitration proceedings, the method of delivery of the arbitral award to the consumer and the fact that the final arbitral award is enforceable).

In Luxembourg, consumers can validly consent to arbitration, but they need to comply with particular mechanisms of signature of the clause, in order to ensure that the consent is conscionable. In particular, the arbitration agreement is valid only inasmuch as parties have consented to it in the form of minutes before the arbitrators, a notarised document, or a private agreement in electronic form or by tele-transmission clearly evidencing the common will of the parties to submit their dispute to arbitration.

In Spain there is a specific type of consumer arbitration, generally based on equity, administered by a certain number of arbitration boards around the country. This is the only valid kind of consumer arbitration; moreover, if the agreement is concluded before the dispute has arisen, it is not binding on the consumer, but only on the other party. A pre-dispute arbitration clause thus gives the consumer the right to resort to arbitration, but is not tantamount to a waiver of access to State courts.

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2.2. Law and Practice by State

2.2.1. Austria

Overview

Austria has achieved prominence in arbitration in several ways, which feed together to create a distinctive character for Austrian arbitration. Austria has, for example, produced some of contemporary international arbitration's leading practitioners, and the University of Vienna is widely recognised as a leading academic centre for arbitration expertise. In addition, Austria has achieved a prominence in Eastern Europe as an arbitral seat, in many cases being preferred by Eastern European practitioners to their own State.

These things clearly indicate the existence of a strong arbitration culture within Austria, and this is further confirmed by the current Austrian legislation, which is based closely on the UNCITRAL Model law, and thus overwhelmingly reflects contemporary views on how arbitration should be regulated. In addition, since 2013, appeals against arbitral awards are heard directly by the Austrian Supreme Court, thereby significantly reducing any potential delay in the final resolution of disputes submitted to arbitration.

While this latter change is clearly a positive one, it indicates a complication that must be added to the preceding picture of a strongly pro-arbitration Austria, as this concentration of appeals in a higher court is standardly a measure introduced in States in which lower courts are seen to have a less positive view of arbitration, and cannot be relied upon to rule on challenges in as arbitration-friendly way as the court to which challenges have been assigned. Indeed, results from Austrian respondents to the Survey of Arbitration Practitioners undertaken for this Study indicate the existence of such a situation in Austria.²² Specifically, evaluations by practitioners of the attitude of Austrian judges towards arbitration, while generally positive, were nonetheless on average lower than was the case for respondents across the Survey. Similarly, Austrian respondents evaluated Austrian judges' understanding of arbitration as slightly lower than was the case of respondents Survey-wide with respect to judges in their own States. Austrian courts were also described by Austrian respondents as adopting a less liberal approach when determining the validity of arbitration agreements than was the case of respondents Survey-wide. These results are arguably inconsistent with the supportive attitude displayed towards arbitration by the Austrian Supreme Court.

One possible explanation for these apparent inconsistencies in the pictures of arbitration in Austria just discussed lies in precisely the strength of Austrian arbitration at an international level, and an apparent split that seems to have developed between domestic and international arbitration in Austria. That is, Austrian respondents to the survey generally reported a notably higher rate of engagement in international commercial

²² Details of the responses provided to the questions in the Survey, both by respondents Survey-wide and specifically by respondents who identified Austria as their State, are included in an Annex to this Study.

arbitration than was the case of respondents Survey-wide. In turn while both Austrian practitioners and respondents across the Survey reported that domestic commercial arbitration constituted 1-25% of their work, Austrian practitioners tended to report lower rates than respondents across the Survey. Similarly, while the estimate by Austrian respondents of the rate at which arbitration agreements are included in international commercial contracts in Austria was equivalent to that provided by respondents Survey-wide with respect to their own States, Austrian respondents had a lower estimate of the rate of inclusion of arbitration agreements in domestic commercial contracts in Austria than was the case with respondents Survey-wide with respect to their own States. Estimates of this nature cannot, of course, serve as accurate guides to the actual number of arbitration agreements included in contracts in a State, but they provide important information on the experience of arbitration professionals regarding the degree to which arbitration has been incorporated into a State's business practices.

Similar evidence of a split between domestic and international arbitration practice in Austria appears in the fact that Austrian respondents to the Survey who practice as arbitrators reported a far higher rate of appointments abroad than was the case for respondents Survey-wide. Obviously on the one hand this reflects well on the international reputation of Austrian practitioners, however it also provides further indication of the lack of available appointments as arbitrator within Austria itself. Notably, the traditional international arbitration centres of England, France and Switzerland were all important sources of appointments, although German and Eastern European countries, particularly Romania and the Czech Republic were also important. Austrian arbitrators, then, report having a distinctively international practice, consistent with the differences between the environments for international and domestic arbitration in Austria described above.

There is no question that Austria has achieved a solid place in the international arbitral community, both in terms of the quality of its practitioners, and as a desirable seat for international arbitrations. There are strong indications, however, that this success has come through the formation of an international arbitration elite, rather than through a strong embrace of arbitration across the Austrian legal community and within Austrian society.

Focus

(i) Revision of VIAC Arbitration Rules

The rules of arbitration of the Vienna International Arbitral Centre (VIAC Rules) were revised in 2013. Since the 2006 version of the rules has proved successful amongst practitioners, the basic structure of the proceedings remains the same; however, the new rules introduce some interesting amendments on specific matters, mostly relating to the duration and functionality of the proceedings.

Firstly, the new rules address the issue of the joinder of third parties (Article 14) and consolidation of proceedings (Article 15): these reforms aim at making arbitration possible and effective, even when the dispute is complex because of the number of parties involved or because of multiple claims. The joinder of a third party is decided by the arbitral tribunal upon the request of a party or a third party, after hearing all parties and the third party to be joined as well as after considering all relevant circumstances. Upon a party's request two or more proceedings can be consolidated, not only if the parties agree to it, but also if the same arbitrators were nominated or appointed.

Secondly, the VIAC rules regulate multi-party arbitration (Article 18). When more than two parties are involved, it is sometimes difficult to constitute an arbitral tribunal, especially in cases where the arbitration agreement states that each party has the right to appoint an

arbitrator. In this case, the side of the claimant or respondent will jointly nominate an arbitrator; however, a party's participation in the joint nomination does not entail acceptance of the multi-party arbitration.

Thirdly, under Article 19, once an arbitrator is nominated, the Secretary General of VIAC confirms the nomination if no doubts exist as far as impartiality and independence are concerned. The arbitrator can be considered appointed only once this confirmation has been provided; this way, arbitrators lacking the necessary requirements of impartiality and independence can be excluded from the arbitral tribunal even before their appointment, with no need for a challenge.

Fourthly, the new rules set forth an expedited procedure, which applies if the parties have included it in their arbitration agreement or if the parties subsequently agree on its application. The main difference between the standard rules and the expedited rules is the time limit for several acts of the procedure; therefore, parties selecting the expedited procedure can rely on a faster arbitration, but must also be aware that it will be necessary for them to comply with tight deadlines.

(ii) Procedure for Setting Aside an Award

The Austrian Arbitration Act, originally adopted in 2006, was revised in May 2013;²³ the new version of the Act amends the procedure for setting aside an arbitral award. Under the amended act, challenges against arbitral awards (with the exclusion of consumer arbitration) must be brought before the Austrian Supreme Court, which has exclusive competence for this kind of action. Before the reform, it was possible to bring an action against an award in the form of an ordinary claim before the competent judicial authority and the decision of the first instance court could be further challenged before the court of appeal and the Supreme Court. As a result, the action could go through three instances and the winning party in the arbitration was in some cases forced to wait for a long time before the award became final. The Supreme Court is now the only competent court for challenges against arbitral awards; when performing this function, the Court exceptionally applies the same rules of procedure as a court of first instance. This comes with significant procedural consequences: under the first instance rules of procedure, the Supreme Court has the power to determine facts and does not need to restrict its judgment to an analysis on point of law, where this is necessary in order to assess whether a challenge is well-grounded.

The recent reform of the Arbitration Act is commonly perceived as an important step towards time and cost efficiency and could have a significant impact on the popularity of Austria as a seat of arbitration.

(iii) Public Policy

Austrian courts tend to interpret the notion of public policy restrictively; an award, order or other measure of the arbitration can run contrary to public policy only inasmuch as it violates a particularly relevant rule, expressly enshrined in a provision of positive law. Only in this case a domestic award can be set aside, or a foreign award can be denied recognition and enforcement on grounds of public policy. On the contrary, if there is no conflict with a specific provision of substantive or procedural law, public policy cannot come into play: since Austrian case-law does not take into account general clauses or other socially-bound notions, an act of the arbitration can be in breach of public policy only inasmuch as it violates a particular rule of positive law. For example, Austrian courts have held that an arbitrator's failure to sign the award, as well as the arbitral tribunal's failure to

²³ The act (ErläutRV 2322 BlgNR 23. GP), approved by the Austrian parliament in May 2013, entered into force on 1 January 2014.

deliberate in person before rendering the award, were not offensive to Austrian public policy.²⁴ In this regard, Austria can be considered an arbitration-friendly legal system, preserving to a large extent the finality of arbitral awards.

Leading Arbitral Institutions

1. Vienna International Arbitral Centre (VIAC)
Visit: 6 June, 2014
Questionnaire: Responses included in Annex

1. Vienna International Arbitral Centre (VIAC)

The Vienna International Arbitral Centre (VIAC) exists in an unusual institutional context that is important to understand as a foundation for understanding the institution itself. Specifically, VIAC administers solely international arbitrations. This is, however, not a reflection of a policy preference, but rather of the federalised structure within which VIAC exists.

VIAC was established in 1975, and is affiliated with the Austrian Federal Economic Chamber. However, in a reflection of Austrian federalism, each of the Austrian Länder also has its own economic chamber, to which a domestic arbitral institution is attached. This includes Vienna, the city in which VIAC itself is located. These domestic arbitral institutions then coordinate, in terms of case assignment, with VIAC in a form of structured federalism. That is, VIAC is prevented by statute from administering domestic arbitrations, which must instead be administered by the institutions attached to the Länder. In turn, the institutions attached to the Länder may not administer international arbitrations, which must be administered by VIAC. Should an arbitration agreement for a domestic dispute wrongly appoint VIAC as the administering institution, that case will simply be transferred to the relevant Länder institution. Similarly, an international arbitration wrongly brought to a Länder institution will simply be transferred to VIAC. This mechanism of case transfer is similar to the one implemented in many national civil procedure systems, but is highly unusual for arbitration.

However, it should be emphasised that while VIAC operates in a distinctive Austrian institutional context, it is by no means a purely Austrian institution. This is reflected in the fact 20% of VIAC's Board is composed of non-Austrians, with the institution aiming to increase this ratio to 30% in the near future. In addition, less than 25% of arbitrations administered by VIAC are conducted in German. German parties are, however, a market at which VIAC particularly aims, as VIAC emphasises its ability to provide a neutral (i.e. non-German) forum that is nonetheless with both the German language and German legal traditions.

While VIAC's international focus is mandated by the federalised structure, it can also be tied to the rationale for VIAC's founding in 1975, which was to serve as VIAC was a neutral forum for the resolution of disputes between Western parties and those from what was then the Eastern Bloc, under a trilateral agreement between the American Arbitration Association, then Austrian Federal Economic Chamber, and the non-Russian Eastern European chambers. Beyond being purely a historical oddity, this foundation has led to an ongoing connection between VIAC and Eastern European parties, with even Ukraine now becoming an important source of cases. VIAC is also increasingly popular with Russian parties and Russian is a language of growing importance for the institution.

While the appeal of VIAC to Eastern European parties is clearly closely tied to VIAC's reputation as a high quality institution, it is also unavoidably related to the lack of any

²⁴ Joint Stock Company v Limited Liability Company, case no 30b154/10h, OGH judgment (13 April 2011).

genuinely Eastern European institution of similar quality. It is unclear that any Eastern European institution is likely to compete with VIAC in this respect in the immediate future. However, with the increasing popularity and governmental acceptance of arbitration in much of Eastern Europe, it is to be expected that arbitral institutions in the region will similar strengthen. As that happens VIAC may find its strong ties to the Eastern European market harder to maintain, despite its institutional quality.

VIAC maintains a list of arbitrators, and makes this list available on its website. Anyone with arbitration experience may ask to be added to the list, with a final decision being reserved to the Secretariat. VIAC is required to appoint an arbitrator in approximately 40% of the arbitrations it administers. When doing so it may make reference to the list if special qualifications or abilities are required, but will also appoint someone from off the list where appropriate. VIAC actively attempts to develop arbitrators where possible, and will appoint new arbitrators to smaller cases as a means of giving them experience. It also considers gender in making appointments, in order to increase the number of experienced female arbitrators.

Along with the Chamber of Arbitration of Milan, the Arbitration Institute of the Stockholm Chamber of Commerce, and the German Institution of Arbitration (DIS), VIAC is a member of the "Gang of Four", an organisation of prominent arbitral institutions of similar size and experience. The Gang of Four centres around annual meetings between the Secretary-generals of the four institutions, as a means of exchanging experiences and best practices. This meeting is then followed by a public "roadshow", in which the institutions provide information on their respective services. One particularly notable feature of this event is that the institutions make no effort to present a "united front", arguing for a particular means of addressing any given situation. Rather, each institution is free to emphasise the particular approach it has adopted, and to argue for its benefits.

Given the recognised prominence of Austrian practitioners within international arbitration, and of VIAC as an administering institution, it is notable that domestic arbitration is comparatively unpopular in Austria. To some degree this might be attributable to the institutional framework within which VIAC exists, which allows for regional control of disputes, but also undermines VIAC's ability to have any significant influence on the development of domestic administered arbitration. Austria, that is, has an international quality arbitral institution, but it is only available to parties engaged in foreign transactions, and it unavoidably focuses its educational and promotional activities on the international arbitration marketplace to which it is restricted. A less strict division of competences between Austria's arbitral institutions might assist in a broader spread of arbitration within Austria, with all of Austria's institutions ultimately benefiting.

2.2.2. Belgium

Overview

Belgium is currently a State in transition with respect to its place within arbitration. In many ways it is an ideal jurisdiction for arbitration, and particularly for international arbitration, as the location of the European Union institutions in Brussels means that Belgium has one of the most developed and culturally/nationally diverse groups of legal practitioners in Europe. As a result, it will usually not be difficult to find either arbitrators or lawyers with a personal understanding of a particular cultural/national background. Similarly, the impact of the European Union institutions also means that facilities for hosting arbitrations are of high quality, and there is a great deal of local experience at dealing with events that require interaction across borders and with diverse participants.

Nonetheless, arbitration remains surprisingly underdeveloped in Belgium, as indicated by the fact that Belgian respondents to the Survey of Arbitration Practitioners undertaken for this Study had, on average, lower estimates of the rates at which arbitration agreements were incorporated into both domestic commercial contracts and international commercial contracts in Belgium than did respondents Survey-wide with respect to their own States.²⁵ Estimates of this nature cannot, of course, serve as accurate guides to the actual number of arbitration agreements included in contracts in a State, but they provide important information on the experience of arbitration professionals regarding the degree to which arbitration has been incorporated into a State's business practices. Similarly, when asked about reasons for incorporating arbitration agreements into contracts, Belgian respondents regarded arbitration as less important, compared with respondents Survey-wide, both where the party against whom enforcement would be sought was domestic, and where the transaction involved foreign elements (but where the place of enforcement was unspecified).

On one level this indicates a satisfaction with Belgian courts, as although there are known to be delays in the Belgian court system, it appears that parties are nonetheless happy to submit their disputes to that court system where domestic enforcement is possible, and are also confident that Belgian courts are capable of handling disputes with foreign elements. The latter, indeed, is particularly unsurprising, given the presence within Belgium of so many non-Belgian individuals and entities, as already discussed. Moreover, despite the issue of potential court delays, Belgian respondents to the Survey actually reported on average slightly faster enforcement speeds for both domestic and international arbitral awards than was the case survey-wide, although there is reportedly a significant difference in Belgium between extremely fast uncontested proceedings and much slower contested proceedings.

However, despite these positive points, it should also be noted that when asked about the comparative cost of taking a dispute to arbitration compared with taking a dispute to litigation, Belgian respondents were more likely to regard arbitration as more expensive than courts than were respondents Survey-wide. These results, of course, will vary depending on the costs of respective national court systems, rather than just on the cost of arbitration in different States, and reflects solely perception, rather than demonstrated costs, but nonetheless the perception among Belgian respondents that arbitration is notably more expensive than Belgian courts would further explain the comparatively lower lack of enthusiasm for arbitration that seems to be found in Belgium.

With the adoption in 2013 of the new arbitration law, however, based as it is very closely on the UNCITRAL Model Law, and with the existence within Belgium of an active and respected arbitral institution, the Belgian Centre for Mediation and Arbitration (CEPANI), Belgium arguably now has the legal structure, the institutional support, and the local legal expertise that it requires to grow significantly as an arbitral jurisdiction. Indeed, where the new Belgian law most notably departs from the UNCITRAL Model Law is similarly designed to support, rather than hinder, arbitration, as it significantly limits the involvement of Belgian courts in arbitral proceedings. It is important also to note that this new law was developed both at the instigation of the Belgian arbitral community, and with its active participation, and Belgian respondents to the Survey on average regarded Belgium's new law as more supportive of arbitration than respondents Survey-wide regarded their own national laws. Just as importantly, Belgian respondents on average regarded Belgian legislators as having a Positive to a Very Positive view of arbitration, suggesting that these changes to Belgium's approach to arbitration are not likely to be short-lived.

²⁵ Details of the responses provided to the questions in the Survey, both by respondents Survey-wide and specifically by respondents who identified Belgium as their State, are included in an Annex to this Study.

Focus

(i) New Arbitration Law

On 24 June 2013, Belgium adopted a new arbitration law, which amended the 6th part of the Belgian Judicial Code on arbitration. The new law, based on the UNCITRAL Model Law, entered into force as from 1 September 2013.

As one of the most important changes, the new law empowers the President of the Court of First Instance, when no institution has been appointed to administer an arbitration or when the appointed institution is inactive, to decide issues relating to the appointment, replacement and challenge of arbitrators, or to take necessary measures for collecting evidence and to order attachments (Article 1680, §§1-4 of the Belgian Judicial Code). Notably, these supporting proceedings are conducted summarily and the decisions taken by the President of the Court of First Instance may not be appealed. Prior to the reform, any chamber of the Court of First Instance (rather than just its President) had competence on such issues and the supporting proceedings were not conducted summarily. Moreover, certain decisions with respect to the conduct of arbitral proceedings could be challenged before the Court of appeals. This amendment, therefore, significantly reduces the potential involvement of Belgian courts in arbitration, and insulates arbitration in Belgium from the ongoing problems of Belgian courts regarding the backlog of cases and delay of judicial decisions.

The new law also provides that the Court of First Instance (specifically, the chamber located at the seat of the Courts of Appeal in whose jurisdiction the place of arbitration is situated or where enforcement is sought) will decide upon all requests in relation to the enforcement or setting aside of arbitral awards. Importantly, decisions relating to annulment or enforcement of arbitral awards will now only be challengeable directly before the Belgian Supreme Court (Article 1680, §5, of the Judicial Code). This eliminates the need to appeal first to the Courts of Appeal, which are amongst the most backlogged jurisdictions in Belgium, thereby significantly improving the speed with which such challenges can be addressed.

Nonetheless, it remains that case that jurisdiction over such proceedings remains within the competence of the Courts of First Instance (not of its President), and that the Brussels Court of First Instance, the most likely place for such proceedings to be brought, still faces a backlog. As a result, while the legislative changes adopted will improve the speed of such proceedings in Belgium, the length of enforcement and setting aside proceedings in Belgium remains an issue. While the speed of such proceedings will, of course, vary, it can be estimated that a decision on annulment should be delivered within 12-18 months. A similar time period should be expected for decisions on enforcement where the party against whom enforcement is sought contests the proceedings. Where enforcement is not contested, however, a judgment is usually delivered within a matter of weeks.

(ii) Grounds for setting aside an arbitral award

The new Belgian arbitration law overwhelmingly follows the UNCITRAL Model Law, and reproduces from the Model Law the grounds available for setting aside arbitral awards. As a result, an arbitral award can be successfully challenged in case of conflict with public policy, violation of due process or absent or invalid arbitration clause.

In addition to these provisions from the Model Law, however, Belgian law also includes two additional grounds for setting aside an award: the absence or lack of reasoning of the award and the fact that the award has been obtained by fraud (Article 1717, §3, of the Judicial Code).

Importantly, however, Belgian Courts usually apply the “lack of reasoning” ground with caution: the challenge can be successful if the award does not contain any logical ground for the decision, but the Court of First Instance generally avoids a full review of the merits and of the quality of the arbitral tribunal’s reasoning. Because of this, a losing party in an arbitration cannot use this provision to challenge the interpretation given to the applicable law by the arbitral tribunal.

Parties to an arbitration agreement can contractually waive their right to challenge the award, as long as none of the parties is a Belgian national or a Belgian Company (Article 1718 of the Judicial Code). This provision is similar to Swiss law and constitutes a significant departure from French law, according to which, on the contrary, nationals can also renounce to their right to introduce setting aside proceedings.

All grounds for setting aside must be invoked within 3 months of the notification of the award to the parties (Article 1717, §4, of the Judicial Code).

(iii) Limitations to Choice of Law in a Distributorship Agreement

One unusual provision of Belgian law is that parties to an exclusive distributorship agreement concerning all or part of Belgian territory are not allowed to submit their disputes to arbitration, unless Belgian law is chosen as the applicable substantive law. This provision is set forth in Belgium’s Distribution Law of 27 July 1961, as amended in 1971, the purpose of which, it is widely believed, is to protect distributors active in Belgium by limiting, to the degree possible under European Union law, the submission of distributorship agreements to non-Belgian law.

The problem this provision raises is that under European Union law parties to such agreements are free to submit their disputes to a foreign State court without selecting Belgian law as the applicable substantive law. As a result, the provision does not serve to ensure that Belgian law is applied to such agreements, but draws an artificial distinction between parties who select an arbitral tribunal to resolve their dispute and parties who select a foreign court to do so. Nonetheless, the limitation this provision imposes on party freedom in this context has been recently confirmed by the Belgian Court of Cassation. In *Colvi v Interdica*,²⁶ the Court of Cassation held that distributorship agreements should be arbitrable, as long as the governing law is Belgian law. In addition, in *Sebastian International Inc v Common Market Cosmetics*,²⁷ the Court held that restrictions on the arbitrability of disputes arising out of distributorship agreements are permissible, as the New York Convention does not impose any specific obligation on States in this regard.

The specialised nature of this provision means that as a practical matter it will affect very few arbitrations occurring in Belgium. However, the restrictions it places on arbitration are inconsistent with the pro-arbitration focus of the new Belgian law.

Leading Arbitral Institutions

1. Belgian Centre for Mediation and Arbitration (CEPANI)
Visit: 3 June, 2014
Questionnaire: Responses included in Annex

1. Belgian Centre for Mediation and Arbitration (CEPANI)

The Belgian Centre for Mediation and Arbitration (CEPANI), based in Brussels, is Belgium’s leading arbitration and mediation institution. It is a middle-sized arbitral institution that

²⁶ Judgment No JC04AF2 (15 October 2004).

²⁷ Case No C 08.0503.N (14 January 2010).

generally administers mid-range commercial disputes (over the past 5 years, 80% of CEPANI arbitrations involved an amount less than €1,000,000.00). CEPANI was deeply involved in the development of Belgium's new arbitration law, which replaced a law that differed in significant ways from international norms of arbitration regulation. CEPANI saw this reform as important for improving the attractiveness of Belgium as an arbitral seat.

Indeed, this focus on improving the attractiveness of Belgium as an arbitral seat is one distinctive aspect of the approach adopted by CEPANI, as CEPANI has adopted a friendly and collaborative attitude towards other arbitral institutions, including with respect to their administration of arbitrations seated in Belgium. That is, while CEPANI clearly wishes to develop as an institution, it sees that development as closely tied to the development of Belgium as an arbitral seat. Consequently, even the administration by other institutions of arbitrations seated in Belgium is seen as a positive development, as it helps develop the perception of Belgium as a desirable arbitral seat. In turn, this ultimately helps CEPANI as an institution.

While CEPANI does not have a broad range of formal collaborative agreements with other arbitral institutions, it has a particularly close relationship with the Netherlands Arbitration Institute (NAI): representatives from the two institutions meet annually to share their practical experiences and discuss future perspectives. It also highlights its relationships with DIS in Germany and the ICC in Paris.

CEPANI views itself as a general provider of ADR services, focusing not only on arbitration, but also on mediation and other types of alternative proceedings, including mini-trial, expert determination and contract adaptation. However, reflective of the general "hands off" approach to administration that characterises CEPANI, it believes that the choice of ADR mechanism should come spontaneously from the parties, and does not, as a matter of practice, recommend to parties an alternative ADR method than the one they have selected (e.g. recommending mediation to parties who have agreed to arbitrate). CEPANI is also generally opposed to the introduction of mandatory mediation, mandatory arbitration, or similar schemes that have been enacted in some Member States, seeing party choice as essential.

Although the majority (60-70%) of the cases administered by CEPANI are domestic, the institution is not a specifically domestic institution, and is open to the administration of international arbitrations. CEPANI does not consider arbitration an appropriate mechanism for the resolution of consumer disputes.

CEPANI does not maintain a list of arbitrators, and when appointing arbitrators on behalf of parties primarily bases its choice on the requirements of the case and the institution's knowledge of potential arbitrators. In this respect CEPANI believes that it benefits from the great diversity of the legal community in Brussels, as it can as a result select from potential arbitrators with a large range of nationalities and backgrounds. CEPANI asks prospective arbitrators whether they have the time to perform their duties, but does not require them to provide specific details as to the number of other cases they are currently involved in, or their other potentially conflicting obligations. It will emphasise the appointment of new or junior arbitrators to cases involving small amounts in dispute, as a means of developing new arbitrators.

CEPANI characterises itself as adopting a "hands off" approach to the administration of arbitrations, with its primary goal being to ensure that the arbitral proceedings are arranged efficiently and that the arbitration develops in a way all parties find acceptable and fair. This attitude implies avoiding any major intrusion into the conduct of the proceedings by the arbitrators, and allowing the parties to adapt the proceedings to their needs. This approach is important to acknowledge, as while it is perhaps the ideal solution for sophisticated arbitration users, it might prove problematic for parties and practitioners

with no familiarity with arbitration. This raises the question, however, of whether such an approach is ideally suited for an institution attempting to develop arbitration in a State in which it is currently underdeveloped, as many domestic parties are unlikely to be familiar with arbitration,

Similarly, although when an arbitrator in a CEPANI proceeding is challenged, CEPANI renders a reasoned decision, that reasoning remains confidential, and CEPANI is not planning to publishing any of its challenge decisions in the future, even in redacted form. While such an approach helps ensure confidentiality, it may not be best suited for an institution attempting to develop an underdeveloped market, as it does not allow public insight into the efforts the institution makes to ensure the impartiality and independence of arbitrators who serve in its proceedings.

CEPANI's approach to the administration of arbitrations is, in many respects, modelled after that of the Court of Arbitration of the International Chamber of Commerce (ICC), arguably the leading international arbitration institution, and CEPANI actively emphasises this resemblance, promoting itself in many respects as a smaller and cheaper variant of the ICC. The ICC is, of course, certainly an important model for any commercial arbitration institution, and to the degree that CEPANI can provide similar services to the ICC but at a reduced price it is clearly providing a service with market value. However, excessive similarities between CEPANI and the ICC may potentially also have a negative impact on CEPANI's attempts to develop as an institution, particularly beyond Belgium, as parties drafting an arbitration agreement might have difficulty identifying distinctive characteristics of CEPANI, beyond its Belgium location. In other words, in the absence of any distinctive feature as to the way CEPANI proceedings are managed, parties might simply choose, where cost is not the primary concern, to appoint the ICC, which benefits from its leading position in terms of reputation and visibility.

2.2.3. Bulgaria

Bulgaria is not traditionally regarded as a significant arbitral jurisdiction, and few Bulgarian practitioners promote themselves as specialists in arbitration. Indeed, Bulgarian respondents to the Survey of Arbitration Practitioners undertaken as part of this Study reported spending a lower proportion of their work on arbitration matters than was the case with respondents Survey-wide.²⁸ The practical reality of arbitration in Bulgaria, however, is a more complex situation, and has some notable features.

Bulgarian arbitration law, for example, is predominantly based on the UNCITRAL Model Law, although there are some significant differences, as discussed in the Annex to this Study. Moreover, Bulgarian respondents to the Survey, when asked to compare the speed of arbitrating a dispute in Bulgaria compared to taking that same dispute to litigation, rated arbitration as comparatively faster than Bulgarian courts, than did respondents Survey-wide with respect to their own national courts. More notably, the same situation applied with respect to cost, with Bulgarian respondents viewing arbitration as cheaper than Bulgarian courts, while Survey-wide arbitration was regarded as more expensive. In addition Bulgarian respondents reported that enforcement of a domestic arbitral award on average took 0-3 months, while Survey-wide the average was 4-6 months, reflecting the existence in Bulgarian law of a provision allowing for direct enforceability of domestic arbitral awards, on the same basis as a Bulgarian court judgement.

The impression these results create is of an arbitral system in which arbitration is comparatively fast and cheap, and that occurs within a legal structure consistent with

²⁸ Details of the responses provided to the questions in the Survey, both by respondents Survey-wide and specifically by respondents who identified Bulgaria as their State, are included in an Annex to this Study.

international standards. This conclusion would be consistent with the fact that Bulgarian respondents also indicated that arbitration agreements were more likely to be incorporated into both domestic and international contracts in Bulgaria than was estimated by respondents Survey-wide with respect to their own States.

A clear indication of more substantial problems, however, can be seen in the fact that when Bulgarian respondents were asked to select five seats for an international arbitration, only 22.22% selected Bulgaria, making Bulgaria the seventh most preferred seat among Bulgarian respondents. Even Bulgarian practitioners, that is, appear uneager to arbitrate in Bulgaria, at least with respect to international arbitration.

In turn, while Bulgarian respondents indicated a comparatively higher rate of incorporation of arbitration agreements into international contracts in Bulgaria, they also indicated that less of the time they spent on arbitration matters was spent on international commercial arbitration than was the case for respondents Survey-wide. Significantly more of their time spent on arbitration matters, however, was spent on domestic commercial arbitration. This suggests that although Bulgarian parties use arbitration agreements in their international contracts, they do not select Bulgaria as a seat, and consequently Bulgarian arbitration practitioners remain predominantly engaged in domestic arbitration.

Indications of why both Bulgarian practitioners and Bulgarian parties appear reticent to arbitrate in Bulgaria arise from descriptions by Bulgarian respondents to the Survey of the approach to arbitration taken by Bulgarian courts. Bulgarian courts are, for example, described by Bulgarian respondents as significantly stricter regarding both the scope and validity of arbitration agreements than is the case of respondents Survey-wide with respect to their own Courts. Similarly, judges, legislators and business people were each described by Bulgarian respondents as having a lower understanding of arbitration than was the case with respondents Survey-wide with respect to their own States. Further, while, as already noted, enforcement of domestic arbitral awards in Bulgaria was reported to be quicker than was the case Survey-wide, enforcement of international arbitration awards in Bulgaria was reported to be notably slower than was the case Survey-wide, relating to a more complex enforcement process for international arbitration awards, as discussed in the Focus section of this chapter.

Indications are, that is, that while formally the structures are in place to allow arbitration in Bulgaria to function effectively, the application of Bulgaria's laws, and in some cases the detail of its laws, is often notably less pro-arbitration. As a result, the apparent popularity of domestic arbitration in Bulgaria appears to arise from its status as a cheap and quick alternative to Bulgarian courts, rather than from any broader embrace of arbitration by either business people or more than a small group of legal practitioners. In turn, international arbitration, which can be held in other States, is held in other States, thereby depriving Bulgarian practitioners of the opportunity to gain valuable experience, and reducing the likelihood that a significant arbitral community will soon arise in Bulgaria. This situation in turn reduces the likelihood that judges, legislators and business people in Bulgaria will soon develop a greater understanding of arbitration than is reported to be the case at the moment.

Focus

(i) Different enforcement procedures for foreign and domestic arbitral awards

Both international and domestic arbitrations having their seat in Bulgaria are governed by the Law on International Commercial Arbitration (LICA) of 1988, as subsequently amended

in 1993, 1998, 2002, and 2007.²⁹ The LICA is based on the UNCITRAL Model Law on International Commercial Arbitration of 1985. It should be noted, however, that—to date—the LICA did not incorporate the amendments to the UNCITRAL Model Law as adopted in 2006. This may be regarded as a symptom of a lack of timely synchronization of Bulgarian arbitration law with international standards.³⁰

The LICA sets out different procedural frameworks for the recognition and enforcement of foreign and domestic arbitral awards. The LICA defines domestic arbitration as arbitration between parties with domiciles or seats in the Republic of Bulgaria except when a party to a dispute is a company with prevailing foreign participation (LICA, Transitional and Final Provisions, paragraph 3). In turn, arbitration qualifies as international when the parties have their seats outside the territory of the Republic of Bulgaria. The distinction between international and domestic arbitration (and foreign and domestic arbitral awards) is of major practical importance for the purposes of enforcement.

The enforcement of domestic arbitral awards is straightforward and follows the provisions set out in the LICA and the Bulgarian Civil Procedure Code (CPC) that came into force on March 1, 2008.³¹ In fact, the recognition of domestic arbitral awards is somewhat informal and domestic arbitral awards are considered directly enforceable in the Republic of Bulgaria. To enforce a final domestic award, an interested party should submit a request to the Sofia City Court, containing a copy of the arbitration award and evidence of the award being served on the debtor party (Article 51 of the LICA). Subsequently, should the award *prima facie* satisfy the applicable formal requirements and when the Sofia City Court will issue a writ of execution based on the arbitral award containing the enforceable rights.

Additionally, Article 47 of the LICA provides for several grounds under which the Bulgarian Supreme Court of Cassation may set aside domestic arbitral awards. The provisions for setting aside domestic awards mirrors the requirements set out in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention of 1958). Consequently, the setting aside of domestic awards is limited to situations in which arbitrators exceed the scope of their jurisdiction as agreed upon by the parties in their arbitration agreement and when a serious breach of natural justice occurs in the course of arbitration proceedings. An application for setting aside a domestic award needs to be filed by a plaintiff within three months from the day on which the award was served upon the requesting party. This means that the parties have direct access to the Supreme Court of Cassation, which acts as the court of first and final instance for setting aside domestic awards. Moreover, Article 48(2) of the LICA specifies that the Supreme Court of Cassation, at its sole discretion, may allow the suspension of enforcement proceedings when the applicant secures payment of the guarantee equal to the amount of its liability under the award.

In contrast, the enforcement of foreign arbitral awards is more complex. In cases in which the New York Convention of 1958 does not apply or when the party seeking enforcement decides to rely on the enforcement regime under Bulgarian law, the provisions of LICA in conjunction with those of the Bulgarian Private International Law Code should be invoked

²⁹ Published in the State Gazette (SG) No. 60 of 05.08.1988, amended in SG No. 93 of 02.11.1993, amended in SG No. 59 of 26.05.1998, amended in SG No. 38 of 17.04.2001, amended in SG No. 46 of 29.04.2002, amended in SG No. 59 of 20.07.2007, in effect from 01.03.2008. The English version of the LICA is available on the website of the Bulgarian Chamber of Commerce and Industry ('BCCI') at: <http://www.bcci.bg/arbitration/lawofarbitr.htm>.

³⁰ On the other hand, Bulgaria is also a party to the main international conventions regulating arbitration, including the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, the European Convention on International Commercial Arbitration of 1961, and the 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention).

³¹ Published in the State Gazette No. 59/20.07.2007, effective 1.03.2008, amended and supplemented, SG No. 50/30.05.2008, effective as of 1.03.2008.

(Kostadin Sirleshtov & Pavlin Stoyanoff, 2012). An application, containing a copy of the award and a duly authorized certificate proving that the award in question is binding, should be brought before the Sofia City Court. All these documents must be certified by the Ministry of Foreign Affairs of the Republic of Bulgaria. In cases in which the relevant documents are not in Bulgarian, an official translation must be provided. From a practical point of view, the procedure for the recognition and enforcement of foreign arbitral awards is disadvantageous, as pursuant to the Bulgarian CPC the ruling of the Sofia City Court is subject to appeal – first, before the Sofia Appellate Court and, eventually, before the Bulgarian Supreme Court of Cassation. This results in situations in which the recognition and enforcement of a foreign award is significantly delayed, in particular as compared to the enforcement of domestic arbitral awards.

(ii) Invalidation of One-Way Jurisdiction Clauses

In its judgment of September 2, 2011, the Bulgarian Supreme Court of Cassation upheld the position that one-way (unilateral) jurisdiction clauses are invalid under Bulgarian law.³² This view is in line with similar judgments of a few other Supreme Courts of Member States, including the recent judgment of the French Court of Cassation of September 26, 2012.³³ The judgment in question concerned a loan agreement between individuals that contained an arbitration clause under which the lender was authorized to choose at its own discretion a forum for dispute resolution (be it the Court of Arbitration at the BCCI, any other arbitral institution, or the Regional Court of Sofia).³⁴ The Bulgarian Supreme Court of Cassation held that the right of the lender under the one-way arbitration clause at hand fell within the category of “potestative” rights that allowed a party to unilaterally affect the legal rights of its counterparty), which was not permitted under the Bulgarian law. The potestative rights, under the Bulgarian legal regime, may only be established by a legislative act and not by way of agreement between the parties. As a result the Supreme Court of Cassation set aside an arbitration award issued by the Court of Arbitration of BCCI, and stated that the unilateral arbitration clause that bound the parties was *contra bonos mores* and therefore illegal. Although the one-way jurisdiction clause in the discussed judgment concerned a domestic arbitration, the holding of the Bulgarian Supreme Court of Cassation should be valid also with regard to choice-of-law agreements with an international element.

(iii) Arbitration Agreement and the Assignment of Rights

There is an established view among the arbitral tribunals working under the aegis of the Court of Arbitration at the BCCI that the transfer of rights under a contract by way of assignment entails the transfer of rights under an arbitration clause incorporated into such a contract.³⁵ As such, arbitration tribunals in Bulgaria would likely admit their jurisdiction to resolve disputes brought before them by an assignee on the basis of the assignment of the contract.

³² Decision No 71/02.09.2011 in commercial case No 1193/2010, Commercial Chamber, Second Department of the Supreme Court of Cassation.

³³ French Supreme Court decision, *Mme X v Banque Privée Edmond de Rothschild* No 11-26.022 [2013] ILPr 12 (26 September 2012).

³⁴ Sarbinova (2012).

³⁵ Internal Arbitration Case No. 211/2006, Internal Arbitration Case No. 135/2005, International Arbitration Case No. 50/2003; International Arbitration Case No. 8/2001; Arbitration Case No. 69/2001; Arbitration Case No. 54/2000; Arbitration Case No. 7/1996; Arbitration Case No. 68/1994; Arbitration Case No. 30/1994 Arbitration Case No. 44/1993. See: Dr Dafina D Sarbinova, “The Effect of an Assignment of Contractual Rights on Arbitration Clauses. An Interpretation by the Highest Court in Bulgaria,” YIAG media release of April 7, 2010.

The recent case law of the Bulgarian Supreme Court of Cassation advocates a contrary position.³⁶ The Bulgarian Supreme Court of Cassation is of a view that, as a rule, the assignment of rights under the main contract does not imply the automatic assignment of the rights to an arbitration clause contained in the original contract. It is important to stress that the judgments in which the Bulgarian Supreme Court of Cassation dealt with the assignment of an arbitration agreement under the main contract did not result in setting aside the arbitral awards under the ground that arbitrators wrongly admitted their jurisdiction to hear disputes related to the rights of assignees. The awards were, in fact, set aside on different grounds. For example, in a decision no. 70/2012 from of June 15, 2012, the Bulgarian Supreme Court of Cassation found that the arbitral tribunal had held itself competent to hear the dispute even though the dispute had been initially referred to the Bourgas District Court, which constituted a basis for setting aside the award. The recent position of the Bulgarian Supreme Court of Cassation is striking, as it creates room for a potential risk related to the validity and enforceability of arbitral awards rendered by arbitral tribunals in an arbitration brought by an assignee.

Leading Arbitral Institutions

1. Arbitration Court of the Bulgarian Chamber of Commerce and Industry

Visit: Logistics of the Study precluded a visit to the Court

Questionnaire: No responses received

2.2.4. Croatia

2.2.4.1. Overview

Arbitration in Croatia remains relatively rarely used, despite the adoption in 2001 of an arbitration law based on the UNCITRAL Model Law. The explanation for this seems to be a combination of the institutional context in which arbitration occurs in Croatia, and the way arbitration is practiced in Croatia, which combine to undermine, in many cases, the benefits that arbitration can bring. Indeed, in the Survey of Arbitration Practitioners undertaken as part of this Study, when asked to select five States they would recommend as the seat for an international arbitration, only 55.56% of Croatian respondents selected Croatia, making it less popular among Croatian respondents than Switzerland (88.89%) and Austria (77.78%), and no more popular than England, France and Germany (all 55.56%).³⁷

Of particular note with respect to the level of development of arbitration in Croatia, 80.00% of Croatian respondents to the Survey stated that arbitration was not their primary field of work. This is particularly notable because individuals for whom arbitration is a relatively minor part of their practice are far less likely to take a survey devoted to the practice of arbitration. Consequently, the group of respondents to the survey are among those Croatian lawyers more likely to have a substantial arbitration practice. Despite this, Croatian respondents reported, on average, that arbitration constituted 1-25% of their work, compared with average reports of 26-50% for respondents Survey-wide.

Similarly reflecting the low rates of engagement with arbitration in Croatia, Croatian respondents to the Survey estimated lower rates of inclusion of arbitrations agreements in both domestic and international contracts in Croatia, than was the case with respondents Survey-wide with respect to their own States. While the estimate of the rate of inclusion of

³⁶ Decision No 70/15.06.2011 in commercial case No 112/2012, Commercial Chamber, First Department of the Supreme Court of Cassation; Decision No 46/08.05.2011 in commercial case No 789/2012, Commercial Chamber, First Department of the Supreme Court of Cassation.

³⁷ Details of the responses provided to the questions in the Survey, both by respondents Survey-wide and specifically by respondents who identified Croatia as their State, are included in an Annex to this Study.

arbitration agreements in international contracts is higher than with respect to domestic contracts even among Croatian respondents, Croatian respondents nonetheless reported that international commercial arbitration represented a smaller proportion of their arbitration work than was the case with respondents Survey-wide. Estimates of this nature cannot, of course, serve as accurate guides to the actual number of arbitration agreements included in contracts in a State, but they provide important information on the experience of arbitration professionals regarding the degree to which arbitration has been incorporated into a State's business practices. In addition, these results correlate with anecdotal reports that when international arbitrations are held in Croatia, international practitioners are often brought in as primary counsel, with Croatian practitioners doing groundwork.

As already mentioned, a plausible explanation for this apparent low rate of engagement with arbitration in Croatia is a combination of institutional context and arbitral practice. Croatian respondents to the survey, for example, described Croatian courts as stricter on both the scope and the validity of arbitration agreements than was the case with respondents Survey-wide with respect to the courts in their own States. Similarly, while Croatian respondents described Croatian judges as having an Adequate understanding of arbitration, and an attitude towards arbitration between Neutral and Positive, this was in both cases lower than the description given on average by respondents Survey-wide with respect to judges in their own States. In addition, Croatian law, while still described by Croatian respondents on average as Supportive of arbitration, was nonetheless viewed less positively by those respondents than was the case of respondents Survey-wide with respect to their own national laws.

However, while these results do not depict an institutional context actively supporting arbitration, they are similarly certainly not consistently negative. An important additional consideration for explaining Croatia's low levels of engagement with arbitration, then, is the distinctive manner in which arbitration is practiced in Croatia. Domestic arbitration in Croatia is, for example, reported by Croatian respondents to be slower than is reported by respondents Survey-wide with respect to domestic arbitration in their own States.

In addition, while both Croatian respondents and respondents Survey-wide viewed taking a dispute to arbitration in their State as more expensive than taking the same dispute to litigation in their State, Croatian respondents described the comparative expense of arbitration as greater than did respondents Survey-wide. Croatian respondents also described arbitration in Croatia as Slightly Faster than litigation of the same dispute in Croatia, but in this result was no different than the result Survey-wide. Arbitration in Croatia, that is, requires a greater trade-off in cost over litigation than is required on average across the EU/Switzerland, but does not deliver a correspondingly greater benefit in terms of speed.

As already mentioned, one reason for these results is the particular way that arbitration is practiced in Croatia. Arbitrators in Croatia, for example, are overwhelmingly academics, judges, or former judges. Not only does this deprive Croatian practitioners of valuable experience, but such individuals are also less likely to concentrate on the commercial efficiency of proceedings than are practitioners. Moreover, as discussed in the Focus section of this chapter, the provisions of the Croatian Civil Procedure Act are often adopted by arbitrators in Croatia as the procedural rules applicable during an arbitration, thereby depriving arbitration of the procedural flexibility that is one of its primary benefits.

The things that appear to be preventing the development of arbitration in Croatia, that is, are not formal things, such as laws, that can be easily amended. They instead concern vaguer and more difficult to address matters involving the perception within Croatia of arbitration and of how it should be practiced.

2.2.4.2. Focus

(i) Preferential treatment of domestic arbitration in Croatia

Both domestic and international arbitrations that are seated in Croatia are regulated by the Croatian Arbitration Act NN 88/2001 dated 19 October 2001 (the Croatian Arbitration Act), which came into force on the same date.³⁸ The provisions of the Croatian Arbitration Act govern the conduct of domestic arbitration, the recognition and enforcement of arbitral awards and the competence of courts with regard to arbitration. Domestic arbitration is understood as any arbitration conducted in the territory of the Republic of Croatia (Article 2(1)(2) of the Croatian Arbitration Act). International arbitration, in turn, concerns disputes in which at least one party is a natural person with a permanent or habitual residence abroad, or a legal person established under foreign law (Article 2(1) p. 7 of the Croatian Arbitration Act). There are two important observations with regard to the distinction between domestic and international arbitration under Croatian law.

First, the Croatian Arbitration Act does not provide for assistance to foreign arbitral tribunals. Second, in disputes between two Croatian entities arbitration agreements may not provide for a seat outside the Republic of Croatia (Article 3(1) and 3(2) of the Croatian Arbitration Act). Moreover, a dispute may be submitted to international arbitration only if the resolution of such dispute does not fall within the exclusive jurisdiction of the Croatian courts. The subject matter of this exclusive jurisdiction concerns: real estate, ownership and property rights to aircrafts and ships, disputes arising from relations with military units, and disputes that arise during enforcement or bankruptcy proceedings.

The restrictions regarding international arbitration under Croatian law basically mean that two Croatian entities are not permitted to arbitrate abroad despite the fact that the ownership structure of such companies might be foreign. The provisions of the Croatian Arbitration Act in this regard have been said to be discriminatory against foreign investors who establish companies in the Republic of Croatia, since these companies are obliged to arbitrate their disputes with Croatian companies exclusively in the Republic of Croatia. These issues have been a subject of a broad academic discussion, in particular because they are regarded as being contrary to the provisions of the New York Convention on the Recognition and Enforcement of Arbitral Awards of 1958 (to which the Republic of Croatia is a party), as well as to the freedom to provide services under EU law.³⁹

Additionally, international arbitration is still perceived as too expensive and—in some cases—pro-foreign biased. Consequently, Croatian lawyers tend to advise their foreign clients to include arbitration clauses in their contracts with Croatian entities, but discourage Croatian companies from entering into arbitration agreements with foreign parties.

(ii) Application of the provisions of the Civil Procedure Act as subsidiary procedural rules in arbitrations

Pursuant to Article 27 of the Croatian Arbitration Act parties are free to choose the rules of law that should apply to the substance of their dispute. Moreover, the formation, validity and legality of arbitration agreements should be governed by the law determined by the parties. Arbitrators are authorized to exclude the application of the law determined by the parties only if such law is contrary to Croatian public policy or the arbitrability of a dispute. In practice, many arbitrators tend to apply the provisions of the Croatian Civil Procedure

³⁸ Official Gazette, No. 88/2001.

³⁹ The Republic of Croatia maintain the following reservations regarding the applicability of the New York Convention on the Recognition and Enforcement of Arbitral Awards of 1958: (1) reciprocity reservation, (2) commercial reservation, and (3) the reservation concerning the non-retrospective effect of the Convention.

Act of October 8, 1991 with the most recent amendments that came into force on April 1, 2013 (the CPA), as subsidiary procedural rules. This application often takes the form of a proclamation made by arbitrators at the outset of arbitration proceedings (e.g. at the hearing) upon tacit agreement by the parties. The provisions of the Croatian CPA are very detailed and relatively rigid, and so there is a risk that arbitrators who rely on such provisions in a supplementary manner may in fact violate the applicable rules of procedure in the conduct of their arbitrations. This may have significant implications for the annulment of arbitral awards issued in accordance with the provisions of the CPA insofar as non-conformity with the procedural rules agreed upon by the parties can constitute a ground for setting aside an award.

(iii) Academic context of arbitration in Croatia

Under Article 10(3) of the Croatian Arbitration Act, parties are free to agree on the procedure for selecting the members of an arbitral tribunal (or a sole arbitrator). Although there are no particular requirements regarding the capacity of arbitrators, there exists a restriction that Croatian judges can be appointed only as presiding arbitrators or sole arbitrators (Article 10(2) of the Croatian Arbitration Act). In practice, arbitration in the Republic of Croatia is perceived as a privilege of academics and law professors are more frequently appointed as arbitrators than any other group of lawyers (be it attorneys at law or in-house counsel). For example, 36 out of 53 Croatian arbitrators included on the list of arbitrators suitable for the resolution of disputes with an international element at the Croatian Permanent Court of Arbitration are either former or current law professors, or teachers affiliated with Croatian universities. It is often the case that arbitral tribunals are composed of three law professors, even though in practice law professors in the Republic of Croatia constitute a relatively small group of professionals. This situation leads to an isolation of practising lawyers from participating in arbitration proceedings, whose role in arbitration is mostly limited to either the representation of clients in hearings or the provision of legal advice prior to the commencement of arbitration proceedings.

2.2.4.3. Leading Arbitral Institutions

1. Permanent Arbitration Court at the Croatian Chamber of Economy

Visit: Logistics of the Study precluded a visit to the Court

Questionnaire: No responses received

2.2.5. Cyprus

Overview

Arbitration in Cyprus is fundamentally characterised by the split that exists between the law and practice relating to international arbitration and to domestic arbitration. While Cyprus is not the only State in which such a difference exists, and arguments have been made for the benefits such a split can provide, the extent of the difference between the two regimes in Cyprus, combined with the smallness of the legal marketplace in Cyprus, has created significant problems. Ultimately, the international arbitration market in Cyprus is simply too small to sustain a vibrant community of specialists in international arbitration, which is subject to a far more supportive legal regime than is domestic arbitration. Consequently, practitioners engaged in international arbitration must unavoidably also engage in domestic arbitration, as well as in litigation, and this is in turn likely to affect their approach to international arbitration.

Indicative of the problems Cyprus faces in this respect, none of the respondents to the Survey of Arbitration practitioners undertaken as part of this Study reported arbitration as

their primary field of work.⁴⁰ Indeed, whereas respondents Survey-wide reported, on average, that arbitration constituted 26-50% of their work, the average for Cypriot respondents was 1-25%. Notably, individuals with only a peripheral involvement in arbitration are far less likely to take a survey of this nature, and leading individuals were specifically invited to take the survey. Consequently, the group of individuals taking the survey likely reflect the more active end of those involved in arbitration in Cyprus.

International arbitration in Cyprus is governed by the International Commercial Arbitration Law of 1987, which fundamentally conforms to the UNCITRAL Model Law as it existed at that time, and so is overwhelmingly consistent with contemporary views on the proper regulation of international arbitration. In addition, although few Cypriot respondents reported involvement in international arbitration over the past 5 years, those who had been involved reported a quicker procedure than was reported by respondents Survey-wide. Further, Cypriot respondents to the Survey reported that enforcement of international awards in Cypriot courts is slightly faster than was reported by respondents Survey-wide with respect to the courts of their own States. With a modern arbitration law, little court involvement in ongoing arbitrations, and apparently efficient arbitration proceedings and award enforcement, international arbitration in Cyprus is in many ways a very effective process. Indeed, this positive view of Cypriot international arbitration law and practice is reflected in the fact that when asked in the Survey to recommend five States as the seat for an international arbitration, 100% of Cypriot respondents selected Cyprus as one of their five preferred States.

By contrast, domestic arbitration in Cyprus is regulated by a law known as Cap. 4, which was adopted in 1944, long before arbitration became an important mechanism for the resolution of disputes, and which deviates significantly from modern standards regarding the regulation of arbitration, as discussed further in the Focus section of this chapter. In addition, Cypriot respondents on average reported domestic arbitrations taking 13-24 months to be concluded. Notably, this is not only longer than was reported with respect to domestic arbitrations by respondents Survey-wide, but is also longer than was reported by Cypriot respondents for international arbitrations. In addition, whereas Cypriot respondents reported enforcement of international arbitration awards as taking less time than was reported by respondents Survey-wide, Cypriot respondents on average reported enforcement of domestic awards in Cyprus as taking 7-12 months, which is longer than both the average time reported for enforcement of international awards in Cyprus and the average time reported by respondents Survey-wide for the enforcement of domestic awards in their own States.

Perhaps most notably, however, Cypriot respondents on average reported that arbitrators in domestic arbitrations took 7-12 months to deliver the final award after conclusion of the hearings. By comparison, respondents Survey-wide on average reported arbitrators in domestic arbitrations taking 0-3 months after the hearings to deliver their final award. In addition, both Cypriot respondents themselves and respondents Survey-wide on average reported arbitrators in international arbitrations taking 4-6 months after the hearings to deliver their final award.

Cypriot courts were reported by Cypriot respondents to be stricter on both the validity and the scope of arbitration agreements, compared with respondents Survey-wide on average with respect to their own States. Moreover, Cypriot respondents on average described judges in Cyprus as having a less positive view of arbitration than was the case with respondents Survey-wide on average with respect to judges in their own States. Where courts have a negative view of domestic arbitration this is likely to affect their decisions in

⁴⁰ Details of the responses provided to the questions in the Survey, both by respondents Survey-wide and specifically by respondents who identified Cyprus as their State, are included in an Annex to this Study.

arbitration-related cases, and particularly in a jurisdiction in which international arbitration is uncommon they are unlikely to draw a distinction in their decisions between domestic and international arbitration. As a result, until domestic arbitration in Cyprus is reformed, international arbitration in Cyprus is unlikely to be able to take advantage of what is in many ways an effective legal and practical environment.

As noted at the beginning of this section, arbitration in Cyprus is sharply divided with respect to both law and practice between international and domestic arbitration, with international arbitration operating far more effectively. Nonetheless, in a State as small as Cyprus international and domestic arbitration simply cannot function as separated fields, and the negative view of arbitration generated by the problems that exist in domestic arbitration will unavoidably have an impact on international arbitration as well. It is perhaps this that explains why despite the apparent effectiveness of international arbitration in Cyprus, Cypriot respondents to the Survey on average estimated that only 26-50% of international commercial contracts in Cyprus contain an arbitration agreement. By means of comparison, respondents Survey-wide on average estimated that 51-75% of international commercial contracts in their own States included an arbitration agreement.

Focus

(i) The law regulating arbitration in Cyprus

In Cyprus there are different procedures that govern domestic arbitration on the one hand and international arbitration on the other.

The law on domestic arbitration is known as Cap. 4 and came into force on January 6, 1944. Because of its age it does not reflect contemporary views on the legal regulation of arbitration, reflecting instead the early arbitration rules established by the British colonial system, and being most similar in substance to the provisions of the UK Arbitration Act of 1950. It has not been substantially amended since the day of its enactment. Cap. 4 applies to all disputes where the parties involved are Cyprus residents, but may also apply to international arbitration proceedings if the parties so agree, either in a pre-dispute arbitration agreement or in a post-dispute submission to arbitration.

International arbitration is governed by the International Commercial Arbitration Law of 1987 (Law 101/1987), which incorporated most of the provisions of the UNCITRAL Model Law on International Commercial Arbitration of 1985.⁴¹ As such, Law 101/1987 is overwhelmingly reflective of modern standards of arbitration regulation, securing party autonomy and limiting court intervention in international arbitration proceedings, in particular with respect to challenges of arbitrators and setting aside of arbitral awards.

Both laws relate specifically to commercial disputes, where the word “commercial” has been given a broad meaning.

This legislative distinction between domestic and international arbitration is problematic because the significant differences between the two laws creates a situation in which only international arbitrations are regulated in accordance with contemporary standards. Accordingly, the domestic law on arbitration in Cyprus has been criticized for allowing excessively interventionist judicial involvement in arbitration proceedings and review of arbitration awards.

Although Cypriot courts are generally viewed as relatively arbitration-friendly, the fact that the law includes a number of provisions through which courts may exercise control over arbitration is a negative aspect of Cap. 4. By way of example, Cypriot courts enjoy broad discretion over whether to stay court proceedings when such proceedings were initiated

⁴¹ Law 101/1987 was published in the Cyprus Gazette on 29 May 1987.

despite the existence of a valid arbitration agreement between the parties. In addition, where a Cypriot court finds that there has been fraud or dishonesty on the part of an arbitrator, it possesses the power to remit the case to district court, rather than require the dispute to return to arbitration under a new arbitrator. Such provisions contrast strongly with the more liberal procedure applicable to international arbitration, as enshrined in Law 101/1987.

While the differences that often exist between the types of parties and disputes taken to international arbitration and those taken to domestic arbitration can justify applying different legal regimes to the two types of arbitration, the outdated provisions applicable to domestic arbitration in Cyprus serve to undermine the growth of Cyprus as an arbitration jurisdiction. The market for international arbitration in Cyprus is not large enough to support practitioners who focus only on international arbitration, meaning that the development of arbitration expertise amongst practitioners requires active domestic arbitration. The current provisions on domestic arbitration in Cyprus, however, reduce the attractiveness of domestic arbitration, and thereby limit its growth. An updated domestic arbitration law, reflecting international standards but moulded to reflect specific national priorities of Cyprus is essential for the future development of arbitration in Cyprus.

(ii) The absence of a leading arbitral institution

Prior to 2010 there was no permanent arbitral institution located in Cyprus that was able to offer administrative and procedural support for the parties in either domestic or international arbitration proceedings. As a result, most arbitration proceedings in Cyprus were conducted *ad hoc*, with only the most sophisticated parties choosing to arbitrate under a foreign institution. As a result, most parties to an arbitration in Cyprus were required to arrange by themselves every aspect of the proceedings, including agreeing on the applicable procedural rules, appointing the arbitrators, fixing the arbitrator's fees, arranging for the venue where the proceedings should be conducted with all logistics of the hearings, etc. Not only was this extremely time consuming for the parties, but their lack of expertise in arbitration meant that there was no assurance that they would structure and administer their arbitration in an effective way. This situation, therefore, served as a significant discouragement from parties to make use of arbitration.

In 2010, the Cyprus Arbitration and Mediation Centre (CAMC) was established, offering its Arbitration Rules and administration services in both domestic and international arbitrations of a commercial nature. The CAMC Arbitration Rules are largely based on the UNCITRAL Arbitration Rules, as revised in 2010. To date, the caseload of the CAMC remains relatively modest and it remains to be seen if the CAMC manages to achieve its goal of developing Cyprus into an attractive location for arbitration. However, the existence of an active and ambitious arbitration institution in Cyprus is a significant improvement over the situation that existed prior to 2010.

(iii) Negative view of arbitration in the legal community

Other than construction disputes, few other commercial disputes are commonly referred to arbitration in Cyprus, reflecting the fact that arbitration is relatively unpopular with both practising lawyers and within the government in Cyprus.

A number of factors have given rise to this hostility towards arbitration among lawyers, some of them discussed above, but one of the most important is the overcrowded legal market in Cyprus. Because there are no serious restrictions on lawyers-to-be entering legal practice in Cyprus (bar exams are relatively easy to pass), and the major source of income for lawyers is participation in court hearings, there is automatic opposition to anything that would result in the undermining of the traditional court-centred system. Arbitration, therefore, which can be structured both to minimise cost and to maximise speed, is seen as decreasing the likelihood of extensive court hearings, thereby potentially reducing lawyers' incomes.

In addition, because domestic arbitrations are generally operated in accordance with the procedures adopted in Cypriot courts, there is often viewed to be little benefit to parties to participate in arbitration. As a result, parties are discouraged from submitting their domestic disputes to arbitration, thereby hindering the development of arbitration practice in Cyprus, and of awareness within the Cypriot legal community of procedural flexibility that arbitration can provide.

It has also been widely discussed in Cyprus that the Cypriot government is opposed to the inclusion in government contracts of arbitration agreements, as arbitration is perceived as biased against the government. This was most recently illustrated in the instructions issued by the Accountant General of Cyprus in 2013, to lawyers preparing government contracts, that arbitration agreements should not be included in such contracts. These instructions are, however, currently under review.

Given the opposition of the government itself to participation in arbitration, and the perception by practising lawyers that arbitration is a threat to their professional livelihood, it is questionable whether an arbitration culture is likely to develop in the legal community in Cyprus in the near future.

Leading Arbitral Institutions

1. Cyprus Arbitration & Mediation Centre (CAMC)

Visit: Logistics of the Study precluded a visit to the Court

Questionnaire: Responses included in Annex

2.2.6. Czech Republic

Overview

The Czech Republic is widely regarded within the arbitral community as home to one of Eastern Europe's strongest groups of international arbitration practitioners, and in light of that recognition it is arguably surprising that the Czech Republic has not become more prominent as a seat for international arbitrations. Moreover, the current Czech Arbitration law, adopted in 1994, is overwhelmingly reflective of the UNCITRAL Model Law as it applied at that time, and so largely reflects current views on the regulation of international arbitration. However, while practice in the Czech Republic at the elite level of international arbitration is relatively strong, a combination of institutional and formal limitations have prevented the Czech Republic developing into the regional Eastern European centre for arbitration that the strength of its elite legal specialists might have suggested it would do.

Indeed, when respondents to the Survey of Arbitration Practitioners undertaken for this Study were asked to name their five preferred European seats for an international arbitration, only 0.78% of respondents selected the Czech Republic, making the Czech Republic the 27th most preferred State out of the thirty States included in the Study.⁴² Moreover, only 27.27% of Czech respondents selected the Czech Republic as a preferred seat, making it only the seventh preferred seat even amongst Czech respondents, equal with the Netherlands. Finally, while Czech respondents did not regard the Czech Republic's laws as an obstacle to arbitration, they were notably less positive about them than were respondents Survey-wide on average with respect to their own national laws.

It is particularly notable that these results were generated even though there are indications of positive practice regarding arbitration in the Czech Republic. When asked to compare the speed of taking a dispute to arbitration in the Czech Republic versus taking the same dispute to litigation in the Czech Republic's courts, Czech respondents rated arbitration as comparatively faster than Czech courts, compared to respondents Survey-wide with respect to their own States. Moreover, while both Czech respondents and respondents Survey-wide on average described arbitrating a dispute in their State as more expensive than litigating the same dispute in the courts of their State, Czech respondents reported arbitration as being slightly less comparatively expensive than Czech courts, than did respondents Survey-wide on average with respect to their own national courts.

In addition, Czech respondents on average described the domestic arbitrations in which they had been involved in the past five years as taking less time than did respondents Survey-wide. Czech respondents also on average described the international arbitrations in which they had been involved in the past five years as taking a similar period of time to that described on average by respondents Survey-wide. In addition, even with respect to enforcement, Czech respondents reported enforcement proceedings in the Czech Republic relating to domestic awards as being faster than was reported on average by respondents Survey-wide, and reported enforcement proceedings in the Czech Republic relating to foreign awards as taking roughly equivalent amounts of time to that reported on average by respondents Survey-wide.

There are, then, clear strengths to arbitration in the Czech Republic, that make the results discussed at the beginning of this section initially surprising.

Indications of the source of the obstacles to arbitration in the Czech Republic, however, can be seen in the views expressed by Czech respondents regarding the attitudes towards arbitration of Czech courts and legislators. Czech respondents, for example, described Czech courts as stricter regarding both the scope and the validity of arbitration agreements than did respondents Survey-wide on average with respect to their own national courts. In addition, while Czech respondents described the level of understanding of arbitration on the part of Czech judges as Adequate, this was lower than the level of understanding attributed by respondents Survey-wide on average to the judges in their own States. Perhaps more notably, while respondents Survey-wide on average described judges in their own States as having a Positive attitude to arbitration, Czech respondents described judges as having an attitude toward arbitration of between Neutral and Negative.

Similar results were found with respect to the views of legislators. While respondents Survey-wide on average reported legislators in their States as having an understanding of arbitration between Adequate and High, Czech respondents described Czech legislators as having an understanding of arbitration between Adequate and Low. In turn, while

⁴² Details of the responses provided to the questions in the Survey, both by respondents Survey-wide and specifically by respondents who identified the Czech Republic as their State, are included in an Annex to this Study.

respondents Survey-wide on average reported legislators in their States as having a Positive attitude towards arbitration, Czech respondents described Czech legislators as having an attitude towards arbitration of between Neutral and Negative.

Arbitration in the Czech Republic, then, while formally occurring in an environment of active and experienced professionals, and within the structure of a modern arbitration law, is in reality also taking place in what is in many respects a fundamentally negative attitude towards arbitration. In certain respects this negativity has been generated by very specific aspects of the Czech experience with arbitration, such as by the adoption, until very recently, of questionable arbitration practices in the consumer context. Nonetheless, whether the unfavourable view of arbitration held by both Czech legislators and Czech judges is groundless, or reflects an over-generalisation from certain specific instances of poor arbitral practice, it unavoidably impacts upon all types of arbitral practice in the Czech Republic. Provisions of Czech law that currently impede arbitration, such as those discussed in the Focus section of this chapter, are unlikely to be reformed if arbitration is viewed negatively, and as illustrated by the results reported above regarding the approach of Czech judges to the interpretation of the validity and scope of arbitral agreements, judges are unlikely to apply the laws in ways that encourage arbitration and help it develop, if they don't see the development of arbitration as desirable.

There are some clearly positive aspects about the practice of arbitration in the Czech Republic, as well as a body of leading arbitration practitioners with internationally-recognised expertise. But until the perception of arbitration in the Czech Republic is improved, arbitration is unlikely to be able to develop to the degree these positives might suggest it should.

Focus

(i) Choice of *ad hoc* versus institutional arbitration rules

Arbitration in the Czech Republic is governed by the provisions of Act No. 216/1994 Coll. on Arbitration Proceedings and Enforcement of Arbitration Awards, as subsequently amended (the Czech Arbitration Act). Different rules apply to domestic arbitration proceedings administered by the permanent courts of arbitration on one side and non-administered (i.e. *ad hoc*) arbitration proceedings on the other side. This distinction favours arbitration agreements referring to permanent arbitration courts located in the Czech Republic, and sets out additional requirements to be met by the parties to non-institutional (*ad hoc*) arbitration clauses. Under Section 13 of the Czech Arbitration Act permanent arbitral institutions can be established exclusively under the law. Moreover, these institutions can adopt their own procedural arbitration rules that need to be subsequently published in the Business Journal.

Prior to 2011 the case law of the Supreme Court of the Czech Republic was not uniform in its treatment of procedural rules referenced in an arbitration agreement. It was the decision of the Grand Panel of the Supreme Court No. 31 Cdo 1945/2010 dated 11 May 2011 that resolved the uncertainty, definitively favouring institutional arbitration agreements. The Supreme Court of the Czech Republic stated that arbitration clauses which referred to arbitration rules adopted by a legal entity that was itself not a permanent court of arbitration established under the law, and did not contain the name of an arbitrator(s) or the exact procedure for the appointment of arbitrator or a panel of arbitrators, should be considered null and void under Czech law. This position of the Supreme Court of the Czech Republic (supported by the provisions of the Czech Arbitration Act) undermined the effectiveness of *ad hoc* arbitration proceedings in the Czech Republic, including those involving the UNCITRAL Arbitration Rules.

The recent amendments to the Czech Arbitration Act, adopted on 20 December 2011 and effective from 1 April 2012, partially resolved this issue. The new provisions allow the use of arbitration rules of non-permanent arbitration institutions in arbitration agreements provided that such rules are attached to the arbitration agreement or a main contract that incorporates an arbitration agreement (clause). This means that if parties intend to be bound by ad-hoc arbitration rules such as the UNCITRAL Arbitration Rules, they should attach a copy of these rules to their arbitration agreement or to the main contract, instead of simply referring to them in their arbitration agreement or clause.

(ii) Service of the arbitral award

Certain procedural rules contained in the Czech Civil Procedure Code (Act No. 99/1963 Coll.) (the CPC) apply also to arbitration proceedings in the Czech Republic. As a general rule the provisions of the Czech CPC apply to the arbitration processes in the same way as to court proceedings, but the relevance of such provisions in the context of arbitration must be tested on a case-by-case basis.

As such, the service of arbitration awards in the Czech Republic will usually be held to be governed exclusively by the relevant provisions of the CPC relating to the delivery of documents. This means that neither the parties nor the arbitrators may adopt a distinct procedure under which the award will be delivered to the parties.

This application of the provisions of the Czech CPC to the procedure regarding the delivery of arbitral awards is contrary to the general freedom of Czech parties to determine the rules of procedure according to their own intentions. Nonetheless, it has been expressly endorsed by the Supreme Court of the Czech Republic. In a number of decisions (i.e. decisions No 26 Cdo 282/2014, 20 Cdo 2949/2009, 20 Cdo 1694/2009, 20 Cdo 1592/2006), the Supreme Court has stated that arbitration proceedings end with the issuance of the award, and that subsequent actions taken with respect to that award (including its service on the parties) are governed by the relevant rules of the Czech CPC.

This solution is striking, since most permanent arbitration courts located in the Czech Republic developed their own procedures that govern the delivery of arbitral awards, and these sometimes depart from the provisions on delivery of documents enshrined in the Czech CPC. This is the case, for example, for the Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic, the leading Czech arbitral institution. The discrepancy between the institutional and legal regulations on the service of arbitral awards has significant implications for the enforcement of arbitral awards that do not comply with the applicable statutory requirements, even though they comply with the applicable institutional rules and the agreement of the parties. In the light of the case law of the Supreme Court of the Czech Republic arbitrators and arbitral institutions should carefully comply with the statutory provisions for the delivery of arbitral awards in order to ensure that awards are easily enforced in Czech courts.

(iii) Responsibility for an arbitral award

Several constitutional complaints were filed against arbitral tribunals operating under the aegis of the Arbitration Court attached to the Economic Chamber and Agricultural Chamber of the Czech Republic, the leading Czech arbitral institution.

One controversial case concerned a Resolution of the Constitutional Court of the Czech Republic (Ref. No. IV. ÚS 174/02 of July 15, 2002). Although the resolution in question is more than ten years old, it concerns a still relevant discussion on the nature of an

arbitrator's mandate and the possibility of the constitutional review of arbitral awards in the Czech Republic.

The case concerned a motion raised by a party to the arbitration to invalidate an arbitration award issued under the auspices of the Arbitration Court attached to the Economic Chamber and Agricultural Chamber of the Czech Republic. The Czech Constitutional Court first analysed the character of the arbitration award issued by the arbitrators and concluded that the award could not qualify as an act of a public authority, as arbitrators only determined the content of the contractual relationship between the parties and so unlike a court, whose decisions can impact the understanding and application of the law in subsequent disputes between other parties, the arbitrators were not genuinely engaged in the interpretation and application of the law. As a result, the court held, the arbitral award could not be challenged as inconsistent with the Constitution of the Czech Republic.

In addition, the Czech Constitutional Court stated that an award in an institutional arbitration must be regarded as being issued by the administering institution, rather than by the arbitrators as private persons. This conclusion has important implications for questions of responsibility for the contents of an arbitral award, including with respect to any associated damages claims and with respect to locus standi in any proceeding to set an award aside.

The Czech Constitutional Court's decision stands in stark contrast to the conception of arbitration adopted in most Member States, and that dominates throughout the world, in which arbitrators are indeed understood to be engaged in the interpretation and application of the law. It also places a significant burden upon arbitral institutions, who are conventionally understood as merely offering formal administrative services to the parties, and imposes on them an obligation to ensure the legal accuracy of any decision reached by a tribunal in an arbitration they administer, at the risk of being subjected to a subsequent damages claim by an aggrieved party.

Leading Arbitral Institutions

1. Arbitration Court attached to the Czech Chamber of Commerce and the Agricultural Chamber of the Czech Republic

Visit: Scheduling conflicts precluded a visit to the Court

Questionnaire: No responses received

2.2.7. Denmark

Overview

While Denmark's current Arbitration Act, adopted in 2005, is based upon the UNCITRAL Model Law as it stood at the time, and so overwhelmingly reflects contemporary views on the proper approach to the regulation of arbitration, even Denmark's preceding Arbitration Act, adopted in 1972, was in many ways very supportive of arbitration. No doubt as a result of this long formal support for arbitration, arbitration has become a comparatively common and well-accepted mechanism for the resolution of commercial disputes in Denmark.

Indeed, when Danish respondents to the Survey of Arbitration Practitioners undertaken as part of this Study were asked to estimate the proportion of domestic and of international commercial contracts in Denmark that contain arbitration agreements, they made a higher estimate in both cases than was made by respondents Survey-wide with respect to their

own States.⁴³ Estimates of this nature cannot, of course, serve as accurate guides to the actual number of arbitration agreements included in contracts in a State, but they provide important information on the experience of arbitration professionals regarding the degree to which arbitration has been incorporated into a State's business practices. Similarly, Danish respondents described the understanding of arbitration of both business people and judges in Denmark as being higher than was described on average by respondents Survey-wide described with respect to business people and judges in their own States. Moreover, while Danish respondents on average did not describe Danish legislators as having a higher level of understanding of arbitration than was the case on average with respondents Survey-wide with respect to legislators in their own States, neither were they described as having a lower level of understanding. Arbitration, that is, appears to be well-established and well-understood in Denmark.

This said, however, it also appears clear that arbitration in Denmark remains overwhelmingly domestic, as Danish respondents generally reported far greater proportions of their arbitration work as involving domestic commercial arbitration, and far less involving international commercial arbitration, than was reported on average by respondents Survey-wide. Similarly, Danish respondents who practise as arbitrators reported receiving far fewer of their appointments in arbitrations seated abroad than was the case on average for respondents Survey-wide who practise as arbitrators.

Despite the apparent high levels of engagement with arbitration in Denmark, however, it is notable that the higher level of understanding of arbitration in Denmark across judges, legislators, and business people, was not always correlated with an equally positive attitude towards arbitration. Danish respondents did, it should be emphasised, describe Danish business people as having a slightly more positive attitude towards arbitration than was the case on average with respondents Survey-wide with respect to business people in their own States. This is relatively unsurprising, as given the voluntary nature of arbitration there could hardly be the prominent levels of arbitration seen in Denmark unless arbitration was regarded positively within the business community.

More notably, however, while neither Danish judges nor Danish legislators were described as having a negative view of arbitration, Danish respondents described both Danish judges and Danish legislators as having a less positive view of arbitration than was described on average by respondents Survey-wide with respect to judges and legislators in their own States. In addition, Danish respondents described Danish courts as being stricter on both the validity and the scope of arbitration agreements than was the case on average with respondents Survey-wide with respect to courts in their own States. Moreover, Danish respondents on average also reported the enforcement of both domestic and foreign awards in Denmark as taking longer than was reported on average by respondents Survey-wide with respect to the enforcement of domestic and foreign awards in the courts of their own State.

It is also notable that while in some States included in this Study a less positive attitude by courts in general was offset to some degree by a very positive view of arbitration at the highest Court in the State, the Danish Supreme Court has recently confirmed the correctness of a relatively strict approach to the interpretation of arbitration agreements. Notably, this is so even though some active Supreme Court judges are themselves regular arbitrators. Consequently, while arbitration appears to be well-established in Denmark, and Danish judges are certainly not hostile towards it, there nonetheless appears to exist significant institutional reluctance regarding arbitration.

⁴³ Details of the responses provided to the questions in the Survey, both by respondents Survey-wide and specifically by respondents who identified Denmark as their State, are included in an Annex to this Study.

Nonetheless, despite these reservations, Danish respondents did not themselves view arbitration in Denmark negatively. Indeed, when asked to select five States they would recommend as the seat for an international arbitration, 94.44% of respondents nominated Denmark, second only to neighbouring Sweden (100.00%), the established regional leader in international arbitration. Similarly, while Danish respondents described Danish laws as slightly less supportive of arbitration than was the case on average for respondents Survey-wide with respect to their own States, they nonetheless regarded them as Supportive.

Despite the apparent active engagement with arbitration in Denmark, Denmark has not yet gained a prominent place within international arbitration. Danish respondents themselves are clearly confident of Denmark's ability to serve as an effective seat for international arbitrations, and the degree to which arbitration is already used in Denmark indicates that the understanding and infrastructure necessary for a successful international arbitration seat are present in Denmark. However, foreign parties are unlikely to embrace Denmark as an arbitral seat, particularly given the regional prominence of neighbouring Sweden as an arbitral jurisdiction, until arbitration is itself more positively embraced and supported by Danish courts. However experienced such courts might be with arbitration, the nature of international arbitration is that it can be seated anywhere, and foreign parties will see little reason to risk an unfavourable court decision, when they can simply seat their arbitration in another State and enforce any resulting award in Denmark.

Focus

(i) Confidentiality

Although confidentiality is commonly perceived as an important feature of arbitration, not every jurisdiction recognizes it in the same terms. In Denmark, both the legal framework and the existing caselaw offer no clear answer to as to whether arbitration is confidential in the absence of agreement on confidentiality by the parties. It is accepted that arbitral hearings are held in private; however, the Danish system does not enshrine a general principle of confidentiality of arbitration. For this reason, the prevailing view is that no general duty of confidentiality exists for the parties. Some commentators, however, have argued that there is indeed a duty of confidentiality for arbitrators.

Parties can, to a certain extent, impose confidentiality in the arbitration agreement. For example, they can refer to a set of rules providing for confidentiality, such as the rules of the Danish Institute of Arbitration (Article 34), according to which the members of the Arbitral Tribunal, the members of the Board or the Board of Representatives, the Chairman's Committee, the Secretariat and the Secretary General of the DIA must treat all matters relating to the arbitration case as confidential. However, it is not clear to which extent such obligation would be legally binding and could potentially give rise to a contractual responsibility, if breached.

Because of the above, it can be concluded that arbitration in Denmark is generally less confidential than in many jurisdictions, although parties have the possibility to limit the amount of publicly available information by expressly providing for confidentiality in the arbitration agreement.

Hearings held before the national enforcement court for recognition and enforcement of arbitral awards are public. The court has the power to provide for a private hearing, which can happen when necessary to protect trade secrets or State interests, or when it is of special significance for the parties to avoid publicity about a case and there are no overriding public interests contravening this. Although the court is very likely to provide a private hearing in a case concerning an arbitration that was itself conducted under a confidentiality obligation, it cannot be ruled out that the court will decide to allow some

degree of publicity. Therefore, even if the arbitration was conducted confidentially, some information relating to the case might be made public in case the award is challenged before the competent State court.

(ii) Allocation of Costs

According to Section 35(1) of the 2005 Danish Arbitration Act, the costs of the proceedings are allocated between the parties at the arbitral tribunal's discretion; in principle, therefore, the losing party should bear the costs of the arbitration. Nevertheless, arbitrators are sometimes reluctant to impose the full costs on the losing party, because of the influence of the Administration of Justice Act and case law of Danish courts. Danish courts generally use a table with standard rates to determine how much the losing party should compensate the winning party with respect to legal fees. These rates are generally lower than the actual costs incurred by the winning party.

Danish arbitrators tend to follow the same approach, even if the Arbitration Act expressly confers them the power to allocate full costs. Therefore, the winning party may not recover the full costs of the arbitration.

In conclusion, although Section 35(1) expressly enshrines the power of the arbitral tribunal to award costs, some arbitrators are still reluctant to impose the full cost of the arbitration on the losing party. However, in light of the wording of the Arbitration Act, parties can provide the arbitral tribunal with all necessary information about the costs incurred and the winning party should in principle be entitled to recover them, including the counsel fees.

(iii) Setting Aside an Arbitration Award

The Danish Arbitration Act is extensively based on the UNCITRAL Model Law and therefore limits the possibility to bring a challenge against an arbitral awards to the same exclusive grounds. However, the procedure for setting aside an award before a State court is a noticeable aspect of Danish Arbitration: the action must be brought within three months in the same forms as an ordinary court action, under the civil procedure rules of the Administration of Justice Act.

As a result, even if the grounds for challenge are limited, the setting aside procedure can be complex and time consuming, as the first court decision can be further challenged before a higher court, just like any other court judgment. Therefore, in some instances the winning party in the arbitration could be forced by the losing party to undergo extensive court proceedings, before obtaining a final award with *res judicata* effects.

In other States, such as Switzerland, Austria, Belgium and the Netherlands, challenges against arbitral awards are conducted under a special, expedited procedure, which limits the possibility of further recourse and thus enhances the efficiency of arbitration: one possible solution in this regard is to allow the parties to bring the action directly before the Supreme Court. In other cases, the award can be challenged before the first instance court, but judgment issued by this court can only be further appealed if the award has been set aside. Denmark is not currently considering the implementation of similar mechanisms.

Leading Arbitral Institutions

1. Danish Institute of Arbitration

Visit: 28 July, 2014

Questionnaire: Responses included in Annex

1. Danish Institute of Arbitration

Founded in 1981, the Danish Institute of Arbitration (DIA) is a medium-sized arbitral institution with a predominantly domestic caseload, although the institution is actively engaged in efforts to increase its involvement in international arbitration beyond its current 26% level. While the DIA is well-regarded within Denmark it operates in a challenging market, in which *ad hoc* arbitration is reportedly well-established, and Danish courts are inconsistent in their support of arbitration.

One of the distinctive elements of the DIA's caseload is the comparatively large number of maritime arbitrations the DIA administers. While not large in absolute terms (3.6% of the institution's caseload, or roughly 5 arbitrations per year), maritime arbitration is overwhelmingly conducted *ad hoc* under the rules of specialised institutions such as the London Maritime Arbitrators Association or the German Maritime Arbitration Association. Consequently, while Denmark's geographic location and the size of its shipping industry explain the significant involvement of Danish parties in maritime arbitration, it is notable that the DIA has managed to make any inroads at all into maritime arbitration. This is particularly so given that maritime arbitration at the DIA is conducted under the same rules as those for other arbitrations, while specialised maritime arbitration institutions tend to keep their rules short and to minimise any institutional involvement, as a facilitation of the *ad hoc* nature of the proceedings. While some parties are undoubtedly specifically attracted by the "institutional" features of DIA arbitration, the active involvement of the DIA in maritime arbitration more likely reflects both the commitment of the DIA to the field, as indicated by the establishment of a specialised maritime committee, and high regard for the DIA within the Danish maritime community.

The DIA does not maintain a list of arbitrators, although individuals interested in serving as arbitrator do provide their CVs to the DIA. When it is required to make an appointment, the DIA's Secretariat researches potential candidates, and makes recommendations to the Chairman's Committee, which makes the final decision. In a reflection of the level of competition the DIA faces within Denmark from *ad hoc* arbitration, the DIA particularly emphasises its ability to ensure the impartiality and independence of arbitrators, including providing potential arbitrators with a checklist regarding the types of information they must disclose.

While the DIA adopts a predominantly "hands off" approach to the administration of arbitrations, it nonetheless closely monitors proceedings to ensure they are conducted efficiently. They will directly contact arbitrators if an arbitration does not appear to be progressing, and have previously removed arbitrators when delays were regarded as unacceptable. Similarly, the DIA undertakes scrutiny of awards, and while this scrutiny is overwhelmingly focused on issues of formal validity, substantive problems will also be noted. In addition, the DIA fixes the fees for the members of arbitral tribunals.

As already noted, the DIA operates in a difficult institutional context, in which *ad hoc* arbitration is reportedly widely accepted, and judicial support of arbitration is unreliable. In addition, the DIA also likely suffers from the prominence within arbitration of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC). While the DIA's positive reputation within Denmark is likely to preclude the SCC's significant expansion into the local Danish market, it is also likely to impede the DIA's attempts to establish itself on the international stage. Foreign parties, that is, may often see the SCC as the Scandinavian institution of choice, and see no particular reason to use the services of the DIA instead. In this respect the DIA's current plans to expand its activities into neighbouring Norway, which lacks a prominent arbitral institution of its own, provides a sensible opportunity. In addition, since the SCC increasingly sees itself as a global arbitral institution, the DIA may be able to expand beyond Danish borders, including into Sweden, in the areas of domestic arbitration and lower-value international disputes with a regional character.

2.2.8. England, Wales and Northern Ireland

Overview

England, Wales and Northern Ireland (hereafter “England” and “English” for convenience) is one of the world’s leading arbitral jurisdictions. Although England’s arbitral expertise remains overwhelmingly located in London, there is good reason to assert that a greater number of the world’s leading arbitration specialists are located in London than in any other city in the world. In addition, English law and caselaw regarding arbitration, while clearly not uniformly assented to, has been very influential worldwide.

The degree of professionalization of arbitration in England can be seen in the fact that English respondents to the Survey of Arbitration Practitioners undertaken as part of this Study reported on average devoting a higher proportion of their work to arbitration than was reported on average by respondents Survey-wide.⁴⁴ Indeed, for 43.03% of English respondents, arbitration constituted 76-100% of their workload. Similarly, English practitioners who work as arbitrators on average reported their arbitrator work constituting a higher proportion of their overall work than was reported on average by respondents Survey-wide, with 20.93% reporting that serving as arbitrator constituted 76-100% of their work.

Moreover, in a reflection of the international recognition given to English arbitration specialists, while English respondents who work as arbitrators were not more likely to receive appointments in arbitrations seated outside England than were respondents Survey-wide to receive appointments seated outside their own State, where they did receive such an appointment it was much more likely to be with respect to a State outside the European Union/Switzerland than was the case Survey-wide. There is certainly a degree to which this is a function of both English colonial history and the global spread of English-influenced common law systems, however the States reported by English respondents to have been seats of arbitrations in which they have served over the past 5 years exhibit much more diversity than such an explanation would allow. A further contributing factor, however, is likely to be the success London-based arbitral practices have had in attracting arbitration specialists from around the world, thereby making “English” arbitration a particularly nationally diverse affair, and consequently particularly likely to be the location of an arbitrator who receives appointments in arbitrations seated abroad.

In addition to the professionalization of arbitral practice in England, however, the social and legal infrastructure surrounding arbitration in England has also played an important role in England’s development as an arbitral centre. English arbitration law, for example, was described by English respondents as somewhat more supportive of arbitration than respondents Survey-wide on average described their own national laws. Similarly, both English judges and English business people were reported by English respondents as having a higher level of understanding of arbitration than was reported by respondents Survey-wide with respect to their own States. Moreover, English respondents on average regarded English judges as having a more positive attitude towards arbitration than did respondents Survey-wide on average with respect to judges in their own States.

These positives being said, it is nonetheless notable that when respondents from the States of the British Isles (United Kingdom, Ireland) are removed from the results of the Survey, the percentage of respondents selecting England as one of the five States they would

⁴⁴ Details of the responses provided to the questions in the Survey, both by respondents Survey-wide and specifically by respondents who identified England, Wales and Northern Ireland as their State, are included in an Annex to this Study.

recommend as the seat of an international arbitration declines to 60.54% from 69.17% for respondents Survey-wide. To some degree this will reflect cultural differences, and in particular differences between the English common law system and the civil law systems dominant in the remainder of the European Union. However, it also reflects a perception that arbitration in England is comparatively more expensive than arbitration in the remainder of Europe, particularly because of the hourly billing rate common in English practice. Indeed, while English respondents actually described arbitrating a dispute in England as equivalent in cost to litigating the same dispute in English courts, while respondents Survey-wide on average described arbitrating a dispute in their State as between equivalent in cost and Slightly More Expensive than litigating the same dispute in the courts of their State, this provides little evidence on this question, as the same billing system that has been cited as problematic in the context of arbitration in England is also used in English litigation.

There is no question that England is an “arbitration-friendly” State, and there are good grounds for concluding that London currently has the strongest group of arbitration practitioners of any city in the world. Many of these practitioners, however, have come from other States where arbitration is not as strongly supported, and where the incomes of lawyers are comparatively lower. While the degree to which arbitration has been embraced in England means it is unlikely to stop being a major arbitral centre at any time in the near future, it is less clear whether it will retain its current leading position as other States continue their current trend of becoming more arbitration-friendly, arbitration expertise becomes more diffuse, and questions of the comparative cost of arbitration become more pronounced.

Focus

(i) Conflicts of interest

One particularly distinctive feature of the arbitration scene in England, Wales and Northern Ireland is the important role of barristers, who often act as arbitrators and as counsel to parties to arbitration proceedings. Most notably, while it would be regarded as a conflict of interest for an arbitrator to serve in a proceeding in which a member of the arbitrator’s law firm was counsel to a party, this situation is regarded as raising no concerns where the two lawyers are members of the same barristers chambers. A presumption is adopted by courts that barristers working within the same chambers are independent of their colleagues at that chamber.

With the increased participation of barristers in international arbitration, this presumption has been increasingly questioned by parties and arbitration practitioners from civil law jurisdictions in which the role of barrister does not exist, as well as those from common law countries (including England, Wales and Northern Ireland). In addition, the ‘Guidelines on Conflicts of Interest in International Arbitration’ adopted by the International Bar Association (IBA) on May 22, 2004, which are widely accepted as the most authoritative guide to conflicts of interest in international arbitration, included this situation in their “Orange List” of situations that may give rise to a conflict of interest that would justify precluding an arbitrator from serving in a proceeding.⁴⁵

Importantly, even recent English case law appears to reflect a less tolerant position towards conflicts of interests arising from barristers sitting in the same sets of chambers. Until recently, there was a general rule under the English law providing that the organisation of the barrister’s chambers *per se* did not raise justifiable doubts about an

⁴⁵ Moreover, the Guidelines are currently being revised, and there are suggestions that the revised draft will be more restrictive regarding conflicts of interest involving barristers.

arbitrators' impartiality, save when there existed a personal connection between the barristers in question.⁴⁶ In 2006, however, in the case *Smith v Kvaerner*, the Court of Appeal held that a Recorder should not be permitted to sit in a case in which one or more advocates were members of his chamber.⁴⁷

Importantly, the court's reasoning in *Kvaerner* was based on changes in the reality of barristers' chambers, which have involved increasingly tight connections between members of chambers, including with respect to funding, and increased efforts to market chambers based on shared expertise, in a manner similar to that of law firms. While the formal financial separation that often still exists in barristers' chambers may not justify adoption of an absolute rule precluding all arbitrators from serving in an arbitration in which a colleague from chambers is serving as counsel, the ongoing changes in the nature of barristers chambers suggest that successful challenges on this ground are likely to become more common.

(ii) Appeal on points of law in arbitral awards

Section 69 of the English Arbitration Act of 1996 (English Arbitration Act) permits an arbitral award to be challenged in the High Court on the basis of the award's findings on points of law. Where the court finds the challenge to be valid, it may remit the arbitral award to the tribunal for reconsideration, or set the award aside in whole or in part. The decision to allow appeals on points of law was a conscious deviation from the UNCITRAL Model Law, under which such appeals are not allowed, and is a distinctive feature of the English Arbitration Act (a similar provision has been incorporated into the new Scottish Arbitration Act).

It is important to recognise, however, that legal error appeals under the English Arbitration Act are subject to strong restrictions aimed at ensuring party autonomy in arbitration, and minimising the degree to which courts can be asked to undertake substantive review of arbitral awards. The mere existence of an error of law in an arbitration award, that is, does not constitute a ground for an error of law appeal under the Act.

Firstly, appeal is only available on points of English law, meaning that an award containing a mistake of foreign law cannot be appealed, even if the arbitration was seated in England. This restriction is not expressly included in the Arbitration Act, but exists because under English law questions of foreign law are regarded as questions of fact, rather than questions of law. Consequently, the term "question of law" in the Act has been interpreted to mean only questions of English law.

Secondly, appeal is only possible either with the agreement of all parties to the proceedings, or with leave of the court. As it is unlikely that the successful party in an arbitration will wish the award to be challenged, and the rules of the major arbitral institutions preclude appeal of awards, agreement of the parties is only likely if it is included in the original arbitration agreement. This, however, requires a degree of sophistication regarding arbitration law that many parties simply do not possess.

Thirdly, while appeal is possible with leave of the court, even without the agreement of all other parties to the proceedings, this leave is granted in very restricted circumstances. Specifically, leave will only be granted where "(a)...determination of the question will substantially affect the rights of one or more of the parties, (b)...the question is one which the tribunal was asked to determine, (c)...on the basis of the findings of fact in the award— (i) the decision of the tribunal on the question is obviously wrong, or (ii) the question is one of general public importance and the decision of the tribunal is at least open to serious

⁴⁶ The Laker Airways case [2000] 1 WLR 113

⁴⁷ *Smith v Kvaerner Cementation Foundations Ltd* [2006] APP.L.R. 03/21

doubt, and (d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question." Again, then, the mere existence in an award of a mistake of fact will constitute ground for leave to challenge the award in court.⁴⁸

The restricted nature of the possibility of appeal was confirmed recently in *Cottonex Anstalt v Patriot Spinning Mills* [2013] EWHC 236. In this judgment the court acknowledged that when the right to appeal under Section 69 of the English Arbitration Act is invoked by a party, the appeal must concern issues already resolved in the arbitration. The respondent may not raise additional issues in the appeal, although the respondent may raise additional issues of law if they are connected with the facts established by the arbitral tribunal.

A recent study found that 65 appeals on points of law under the English Arbitration Act occurred in the period June 2009-June 2013.⁴⁹ While significant in absolute terms, this occurs in the context of what the authors estimate to be over 3,000 arbitrations known occurring under the Act in the same period. Moreover, 65 per cent of the appeals concerned awards that arose from arbitrations involving maritime disputes. This is significant because English courts have adopted a rule of being less strict in the granting of leave to appeal on points of law where the contract underlying the dispute was a form contract, rather than one expressly negotiated by the parties. As the use of form contracts is a dominant feature in the maritime industry, this indicates that most appeals on points of law occur under this less strict standard, indicating that leave to appeal will actually be less common than the numbers above would indicate.⁵⁰

Consequently, although appeal on point of law is an important feature of the English Arbitration Act, it is subject to a number of restrictions, and its incorporation into the Act should not be understood as indicating a likelihood that courts applying the Act will willingly interfere with the legal interpretations adopted by arbitral tribunals.

(iii) Third party funding

Third party funding (TPF) in arbitration involves the funding of one party's involvement in arbitral proceedings by a party that has no pre-existing interest in the resolution of the underlying dispute. In exchange the funder will receive a portion of any compensation awarded to the funded party, and where no compensation is awarded will usually receive nothing.⁵¹

English law has traditionally been very restrictive regarding TPF, the rationale for these restrictions most famously being expressed by Lord Denning in *Re Trepca Mines* (No 2) [1963] 1 Ch 199: "The reason why the common law condemns champerty is because of the abuses to which it may give rise. The common law fears that the champertous maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses". Where a TPF agreement was found to be illegal, the funding agreement would be unenforceable, although the substantive claims would be unaffected. In addition, however, if the TPF-funded litigation was unsuccessful, the funder would potentially be liable for the costs of the entire litigation, including the attorney fees of the non-TPF-funded party, up to the amount of the contribution made.

Recently, however courts have shown an increasingly flexible attitude towards TPF.⁵² As a

⁴⁸ See, e.g. *CMA CGM SA v Beteiligungs-Kommanditgesellschaft MS Northern Pioneer Schiffahrtsgesellschaft MBH & Co* (2003) 1 W.L.R. 1015.

⁴⁹ Miles & Li (2014)

⁵⁰ Miles & Li (2014).

⁵¹ Jackson, Lord Justice (2009) at viii

⁵² See, e.g. *Arkin v Borchard Lines Ltd & Ors* [2005] EWCA Civ 655; *Sibthorpe v Southwark Borough Council* [2011] EWCA Civ 25; *Harcus Sinclair v Buttonwood Legal capital Ltd* [2013] EWHC 1193.

result, there are now a range of entities offering third party funding for disputes in English courts. The same funders are, of course, also willing to fund claims brought in arbitration, and certain funders have gained a high profile within the field.⁵³

Leading Arbitral Institutions

1. Centre for Effective Dispute Resolution (CEDR)
Visit: Logistics of the Study precluded a visit to the institution
Questionnaire: Responses included in Annex
2. JAMS International London
Visit: Logistics of the Study precluded a visit to the institution
Questionnaire: No responses received
3. London Court of International Arbitration (LCIA)
Visit: It was not possible to arrange a visit to the Court
Questionnaire: Responses included in Annex
4. London Maritime Arbitrators Association (LMAA)
Visit: Logistics of the Study precluded a visit to the Association
Questionnaire: Responses included in Annex

2.2.9. Estonia

Overview

Although Estonia has had a national arbitration law based on the 1985 UNCITRAL Model Law since 2006, and so has laws overwhelmingly reflective of contemporary standards regarding the regulation of arbitration, arbitration remains relatively undeveloped in Estonia. Indeed, all Estonian respondents to the Survey of Arbitration Practitioners undertaken as part of this Study reported that arbitration constituted a minority of their work, with all reporting spending only 1-25% of their time on arbitration.⁵⁴ Moreover, even amongst those involved in arbitration, Estonian respondents reported a longer period before they became involved in their first arbitration, indicating a relative lack of opportunities to participate in the field.

More generally, when asked to estimate the proportion of domestic commercial contracts and international commercial contracts entered into in Estonia in the past five years that contained an arbitration clause, Estonian respondents estimated lower rates of usage of arbitration agreements than did respondents Survey-wide on average with respect to their own States. Estimates of this nature cannot, of course, serve as accurate guides to the actual number of arbitration agreements included in contracts in a State, but they provide important information on the experience of arbitration professionals regarding the degree to which arbitration has been incorporated into a State's business practices.

The apparently low level of arbitration in Estonia is in some respects surprising since, as already mentioned, Estonia has an arbitration law based on the UNCITRAL Model Law, and Estonian respondents report that arbitration in Estonia is in some respects quite effective.

⁵³ A task force of arbitration experts acting under the auspices of the International Council for Commercial Arbitration (ICCA) is currently addressing the problem of third-party funding in arbitration. The group, chaired by professors Catherine Rogers, William W. Park and Stavros Brekoulakis, is systematically studying the topic in order to make proposals and recommendations regarding the procedures, ethics, and related policy issues of third-party funding.

⁵⁴ Details of the responses provided to the questions in the Survey, both by respondents Survey-wide and specifically by respondents who identified Estonia as their State, are included in an Annex to this Study.

Estonian respondents, for example, report that arbitrating a dispute in Estonia is both Much Faster than litigating the same dispute in Estonian courts, and no more expensive. Indeed, Estonian respondents on average report that both the domestic and the international arbitrations in which they have been involved over the past 5 years concluded in less time than was on average reported respondents Survey-wide.

Undoubtedly related to this result, Estonian respondents also report that final awards in both the domestic and the international arbitrations in which they have been involved over the past five years were delivered in less time after the conclusion of hearings than was reported by respondents Survey-wide, with every Estonian respondent reporting an average time of less than three months. Moreover, Estonian respondents also reported enforcement proceedings in Estonian courts for both domestic and foreign arbitration awards taking less time than was reported on average by respondents Survey-wide with respect to their own States.

There are, then, clearly positive aspects to arbitration in Estonia as it is currently practiced. Nonetheless, it is notable that when asked to identify five States that they would recommend as the seat for an international arbitration, only 66.67% of Estonian respondents selected Estonia, making it only the third most preferred seat among Estonian respondents, behind both Finland and Sweden.

Potential indications as to the reason for this apparent inconsistency can be seen in the descriptions of Estonian respondents of the levels of understanding of arbitration and the attitude to arbitration of Estonian business people, legislators, and judges. Estonian respondents, that is, rated Estonian business people, legislators and judges lower on both of these characteristics than did respondents Survey-wide with respect to business people, legislators and judges in their own States.

What is particularly notable, however, is that nonetheless Estonian respondents did not describe Estonian business people, legislators and judges as actually having negative views of arbitration. Rather, in each case they were regarded as having a Neutral attitude. By contrast, when describing the level of understanding of arbitration of these groups, Estonian respondents were far more negative. That is, Estonian respondents on average described Estonian legislators as having a Low understanding of arbitration, and both Estonian business people and Estonian judges as having an understanding between Average and Low.

What the above results suggest is that the lack of development of arbitration in Estonia has not resulted from unfavourable laws or a negative institutional context, as is often the case. It may, instead, simply reflect the low levels of arbitration in Estonia. That is, there is little arbitration in Estonia, so business people, legislators and judges have little understanding of it. Because they have little understanding of it, business people do not choose to use it, legislators do not see the need to support it or know how to do so beyond the basic level of adopting the Model Law, and judges are unwilling to adopt "arbitration friendly" interpretations of the law because they do not understand arbitration well, and possibly as a result do not entirely trust it.

The practice of arbitration in Estonia is certainly not without its problems, and in particular the adoption by arbitrators in Estonia of the procedures included in the Estonian Code of Civil Procedure, as discussed in the Focus section of this chapter, seriously limits the procedural flexibility that is one of arbitration's primary benefits. This practice too, however, is arguably more reflective of a lack of familiarity with arbitration even on the part of Estonian arbitrators, than it is of a deep-seated institutional obstacle to arbitration's success. Arbitration in Estonia, then, may benefit most simply from greater consciousness-raising about the positive aspects of Estonian arbitration, and the benefits that arbitration generally can provide.

Focus

(i) Application of CCP norms to arbitration by analogy

Although it has been established by customary practice that the norms of the Estonian Code of Civil Procedure (CCP), which came into force on January 1st, 2006, should not apply to arbitration, the provisions of the CCP are still sometimes used in arbitration proceedings in Estonia, by arbitrators applying them through analogy between the arbitration and a court litigation. This practice is most likely to be seen when both parties to an arbitration are Estonian or when both counsel representing the parties of a non-Estonian origin are Estonian.

The application of CCP norms to arbitration was discussed in two judgments of the Tallinn District Court, namely, (1) in an order of Tallinn District Court dated 23.11.2010 in case 2-09-37645, and (2) in an order of the Tallinn District Court dated 29.06.2012 in case 2-1216851. In the first case, it was clearly stated that provisions of the CCP falling outside the section specifically addressing arbitration could only be applied in arbitration proceedings upon agreement between the parties. In the second order, the Tallinn District Court indirectly confirmed the application of the norms of the CCP to arbitration proceedings even though one of the parties to the arbitration had expressly opposed that application.

The application of civil procedure rules in an arbitration even when opposed by one of the parties is inconsistent with the guiding principle in arbitration that even though most decisions regarding arbitral procedure may be taken by the arbitrators, the procedure is indeed ultimately controlled by the parties. While courts may enforce an award arising from such an arbitration, on the rationale that by continuing to participate in the arbitration the parties have implicitly consented to the application of the CCP rules, the willingness of some arbitrators in Estonia to apply CCP rules by analogy even when such application is opposed by one of the parties is a significant problem, and represents a significant departure by the Estonian arbitral community from internationally accepted norms of arbitration.

(ii) Applicable substantive law

Pursuant to the Estonian law (§742(2) of CCP), in cases in which the parties have failed to agree on the applicable law in their arbitration agreement, and the applicable law has not been determined by a legal Act, Estonian substantive law should be applied, even with respect to foreign parties.

This provision is rather surprising and unusual, and departs from the traditional rule in which the arbitrators retain the power to decide the applicable law, usually through determining the law with the closest application to the dispute. Therefore, it is strongly advised that parties expressly choose the law applicable to their dispute when drafting arbitration agreements, in particular if they do not intend to have their arbitration subject to Estonian law.

(iii) Direct enforcement of domestic institutional arbitration awards

Recognition and enforcement of arbitral awards in Estonia is governed by Articles 753-754 of the CCP. In principle, domestic arbitral awards should be recognized and declared enforceable by a court, however a domestic award that was rendered under the aegis of one of the permanent arbitral institutions operating and located in Estonia is directly enforceable without the need for filing an application before an Estonian court (CCP § 753(1)).

To date this provision has not been subjected to significant discussion in Estonia, as most

arbitrations were conducted under the administrative supervision of the Arbitration Court of the Estonian Chamber of Commerce and Industry, a high profile institution with an established reputation. However, over the last several years a couple of new arbitral institutions have been founded in Estonia. The direct enforceability of awards rendered under the auspices of such institutions means that important questions must be addressed regarding the accountability of such institutions and their compliance with domestic and international arbitral standards.

As there are no legal requirements for establishing and certifying arbitral institutions in Estonia, it has been speculated that there is a risk of some companies creating and financing their own “in-house” arbitration courts, which are then used for the enforcement of contracts to which they are a party. Such arbitration courts are known internationally as “pocket” arbitration courts, and their status as “real” arbitration institutions has been challenged by many courts addressing enforcement proceedings involving an award issued under the auspices of such an institution.

Although, to date, there is no clear evidence of the existence of pocket arbitration schemes in Estonia, commentators have pointed to the establishment of in-house arbitral institutions by SMS consumer loan (or “text loan”) companies as reflecting this practice. This is a highly problematic situation, and recognition of this possibility should result in increased scrutiny of emerging arbitral institutions in Estonia.

Leading Arbitral Institutions

1. Court of Arbitration of the Estonian Chamber of Commerce and Industry

Visit: Logistics of the Study precluded a visit to the Court

Questionnaire: Responses included in Annex

2.2.10. Finland

Overview

To a large degree overshadowed by the prominence within arbitration of neighbouring Sweden, Finland has not yet achieved a substantial presence within international commercial arbitration. It is, however, a State with a growing reputation in the field, led primarily by a respected and active arbitral institution, the Arbitration Institute of the Finland Chamber of Commerce.

The degree to which arbitration has come to be accepted in Finland can be seen in the fact that when Finnish respondents to the Survey of Arbitration Practitioners undertaken as part of this Study were asked to estimate the proportion of both domestic commercial contracts and international commercial contracts entered into in Finland in the past five years that contained an arbitration clause, they made substantially higher estimates than did respondents Survey-wide on average with respect to their own States.⁵⁵ Estimates of this nature cannot, of course, serve as accurate guides to the actual number of arbitration agreements included in contracts in a State, but they provide important information on the experience of arbitration professionals regarding the degree to which arbitration has been incorporated into a State’s business practices. Moreover, the picture these results create of a broad acceptance of arbitration within the Finnish business community is further supported by the fact that Finnish respondents described Finnish business people as having both a greater understanding of arbitration and a more positive attitude toward arbitration than did respondents Survey-wide with respect to business people in their own States.

⁵⁵ Details of the responses provided to the questions in the Survey, both by respondents Survey-wide and specifically by respondents who identified Finland as their State, are included in an Annex to this Study.

Nonetheless, despite the experience with arbitration this clearly provides to the Finnish legal community, arbitration practice in Finland remains strongly regional. Finnish respondents, for example, on average reported that domestic commercial arbitration constituted a higher proportion of their arbitration work than did respondents Survey-wide. Similarly, when asked to recommend five States, from among those included in this Study, as a seat for an international arbitration, three of the five States most often recommended by Finnish respondents were Denmark, Finland and Sweden). An even more strongly regional picture is seen in the practice of Finnish arbitrators, with Finnish respondents who serve as arbitrators reporting a strong concentration of appointments in arbitrations seated in Finland and Sweden.

Finland, then, has yet to achieve substantial international recognition as an arbitration centre, and in turn this affects the depth of international experience that its practitioners are able to develop. Finnish respondents report, however, that Finnish arbitration practice conforms to international standards with respect to both the speed of arbitrations and the interpretation by Finnish judges of both the scope and validity of arbitration agreements. Moreover, although Finnish respondents describe Finnish law, which is not directly based on the UNCITRAL Model Law, as less supportive of arbitration do respondents Survey-wide with respect to their own national laws, it is nonetheless regarded as Supportive.

However, while Finnish law is generally regarded positively by Finnish respondents, the fact that Finnish law not only can be seen to diverge from the Model Law in some notable ways, and that the law has not been updated since 1992, despite the significant development of international commercial arbitration since that time, indicates one potential contributor to the lack of international development of Finnish arbitration, namely a lack of institutional support. Finnish respondents, for example, described Finnish legislators as having both a slightly lower understanding of arbitration, and a less positive attitude towards arbitration, than do respondents Survey-wide with respect to legislators in their own States. Similarly, while as already noted Finnish respondents described Finnish courts as taking equivalently liberal approaches to the validity and scope of arbitration agreements as did respondents Survey-wide with respect to courts in their own States, Finnish respondents nonetheless described Finnish judges as generally having a lower understanding of arbitration and a less positive attitude towards arbitration than did respondents Survey-wide with respect to judges in their own States, although that understanding was still described as between Neutral and Positive, rather than Negative.

Finland appears, then, to be an arbitration State “in waiting”, with a developed arbitration practice and an active and respected arbitral institution, but with limited success in attracting international attention, and similarly limited levels of active support from domestic legal institutions. The domestic arbitration environment in Finland is certainly far from hostile, and this has undoubtedly contributed to the ability of arbitration to thrive domestically, however without more active support from Finnish legislators and judges, Finland will most likely continue to struggle to achieve a substantial international presence within arbitration, as there are simply too many other States within Europe where that sort of active support is indeed available.

Focus

(i) An arbitration agreement may be declared null or adjusted under section 36 of the Finnish Contracts Act

The Finnish Contracts Act (228/1929) contains a section on unfair contract terms, granting to State courts the power to adjust or declare contracts terms null and void if they are found to be unreasonable or unfair. As this section also applies to arbitration agreements, Finnish courts possess the power, under section 36 of the Contracts Act, to adjust the

terms of an arbitration agreement or annul it completely, whenever a court deems that the terms of the arbitration agreement unreasonable or unfair.⁵⁶ Section 36 has been applied, for example, when a natural person who had concluded an investment service contract containing an arbitration clause was declared insolvent, and was therefore unable to make an advance payment or provide security for costs ordered by an arbitral tribunal.⁵⁷

Use of section 36 by Finnish courts has generally been circumspect in the context of arbitration agreements, and has been limited to cases in which a significant economic and bargaining imbalance existed between the parties to the agreement. In this respect, section 36 serves as an important means of ensuring the fairness of arbitration proceedings. However, as this restriction is not contained in the language of section 36, but is merely reflected in the decisions thus far taken by Finnish courts, the discretionary nature of the power granted by section 36 to Finnish courts also creates a risk that some courts may extend the use of this power beyond the context of economic and bargaining inequality, in order to impose the court's own view of what constitutes a fair arbitration agreement. Use of Section 36 by Finnish courts is, therefore, something to be monitored.

(ii) Scope of personal liability of arbitrators

In 2005, the Supreme Court of Finland addressed the issue of an arbitrator's liability for breach of the duty of impartiality.⁵⁸ The underlying arbitration concerned a share purchase agreement between three private sellers and a company owned by a private bank. The arbitral tribunal rendered its award in 1995, and in 1997 the Helsinki Court of Appeal annulled the arbitral award on the grounds of the disqualification of the presiding arbitrator. This arbitrator had, before and during the arbitral proceedings, given an expert legal opinion (on issues different to those addressed in the arbitration) to the respondent company and other members of its corporate group, without disclosing this to the parties in the arbitration.

The sellers subsequently recommenced arbitral proceedings and filed a claim against the presiding arbitrator for losses suffered and for interest on the claim. Both the District Court and the Helsinki Court of Appeal agreed that a breach had occurred. However, both also determined that the arbitrators' liability should be based on tort. In turn, both qualified the arbitrator's conduct as constituting only slight negligence and therefore dismissed the claim. On further appeal to the Supreme Court, the court analysed the relationship between the parties and arbitrators and held both that the nullity of the award was caused by the arbitrator's wrongful actions and that the compensation payable was properly based on contract and not on tort.

The Supreme Court's ruling implies that an arbitrator may be held financially liable for any losses resulting from a failure to disclose any circumstance that would have disqualified them from serving as arbitrator, as such a failure to disclose constitutes a violation of the arbitrator's duties arising from the contract between the arbitrator and the parties.

⁵⁶ In the preparatory works of the Contracts Act (HE 247/1981), a contract clause which could result in a consumer having to pay arbitration costs is taken as an example of unfair terms. Although consumer arbitration is now mainly addressed in consumer specific legislation, business parties may in certain instances be considered to be in a comparable position as a consumer, and subsequently invoke section 36 of the contracts act in order to avoid the effects of an arbitration agreement. As for consumer arbitration, according to section 12:1d of the Consumer Protection Act (38/1978) and section 7:3 of the Housing Transaction Act (843/1994) arbitration agreements concluded between a business party and a consumer before the dispute has arisen are not binding on the consumer. This may complicate the development of consumer-friendly (and inexpensive) online dispute resolution systems.

⁵⁷ KKO 2003:60

⁵⁸ *Ruolas v. Professor Tepora*, Supreme Court of Finland (KKO) 2005:14.

(iii) The Finnish Arbitration Act distinguishes between nullity (section 40) and annulability (section 41)

The Finnish Arbitration Act makes a distinction between nullity and annulability of arbitral awards. The grounds for nullity set forth in section 40 are based on requirements of public interest; nullity is thus based directly on law and implies that an award is null and void from the outset. As a result, benefits or obligations generated by the award before its annulment also cease to exist.

By contrast, according to section 41.1 of the Finnish Arbitration Act, an arbitral award may be annulled by a Court for a number of procedural reasons:

- 1) if arbitrators have exceeded their authority;
- 2) if arbitrators have not been properly appointed;
- 3) if one of the arbitrators could have been disqualified under one of the grounds set forth in section 10 of the Arbitration act;
- 4) if one of the parties has not been afforded a sufficient opportunity to present its case.

Under the cases set forth in section 41, the award remains binding on the parties until annulled by a competent State court. As a result, any legal benefits or obligations generated by the award before its annulment remain valid even after it is annulled.

Although the grounds for declaring an award null and void under section 40 are different from those listed in section 41 for setting an arbitral award aside, they partially overlap and, most importantly, provide a party with an additional ground to resist enforcement. As a result, these provisions in their current form can create uncertainty as to the enforceability of arbitral awards. In light of this, this situation should be examined, with consideration of whether the system should be reformed and the two mechanisms unified, as provided for in the UNCITRAL Model Law.

Leading Arbitral Institutions

1. Arbitration Institute of the Finland Chamber of Commerce

Visit: Logistics of the Study precluded a visit to the Court

Questionnaire: Responses included in Annex

2.2.11. France

Overview

France is one of the most-famous and well-established arbitral jurisdictions in the world. Moreover, rather than merely having a practical prominence within arbitration, French courts and the French arbitral community are known for a willingness to espouse comparatively innovative approaches to the regulation of arbitration, which in some cases have strongly influenced arbitration throughout the world.

The high level of professionalization of arbitration in the French legal community can be seen in several of the answers given by French respondents to questions in the Survey of Arbitration Practitioners undertaken as part of this Study.⁵⁹ French respondents, for example, on average reported becoming involved in arbitration earlier in their careers than did respondents Survey-wide. In addition, fewer French respondents reported arbitration as not being their primary field of work than did respondents Survey-wide, and among those

⁵⁹ Details of the responses provided to the questions in the Survey, both by respondents Survey-wide and specifically by respondents who identified France as their State, are included in an Annex to this Study.

for whom arbitration was their primary field of work, French respondents on average reported arbitration becoming their primary field of work sooner in their careers than did respondents Survey-wide. Unsurprisingly, given these other results, French respondents also on average reported that arbitration constituted a higher proportion of their total work than did respondents Survey-wide.

French respondents also described France as having an institutional structure strongly supportive of arbitration. French respondents, for example, described French arbitration law as more supportive of arbitration than did respondents Survey-wide with respect to their own national laws. French respondents also described French courts as being more liberal in their interpretations of both the validity and the scope of arbitration agreements than did respondents Survey-wide with respect to their own national courts. Indeed, more generally French respondents described French judges as both possessing a greater understanding of arbitration and having a more positive attitude toward arbitration than did respondents Survey-wide with respect to judges in their own States. Arbitration in France, that is, is clearly well-supported at an institutional level.

Given these results, and the prominence of France within international arbitration, it is surprising that both anecdotal evidence and the results of the Survey indicate that domestic arbitration in France is comparatively underdeveloped. French respondents, for example, on average reported spending a lower proportion of their arbitration work on domestic commercial arbitration than did respondents Survey-wide. This may, of course, simply reflect the work practices of the specific respondents to the Survey, however when asked more broadly to estimate the proportion of domestic commercial contracts entered into in France in the past five years that contained arbitration agreements, French respondents estimated a lower proportion than did respondents Survey-wide with respect to their own States. Estimates of this nature cannot, of course, serve as accurate guides to the actual number of arbitration agreements included in contracts in a State, but they provide important information on the experience of arbitration professionals regarding the degree to which arbitration has been incorporated into a State's business practices.

One indication of a potential reason for the apparent relative underdevelopment of domestic arbitration in France can be seen in the fact that when asked to compare the cost of taking a dispute to arbitration in France compared to litigating the same dispute in French courts, French respondents on average estimated a higher comparative cost of arbitration than was estimated by respondents Survey-wide with respect to their own States. In addition, when asked to evaluate the importance of certain features of a contract for deciding whether or not to include an arbitration agreement, French respondents regarded arbitration as less suitable for small value contracts than did respondents Survey-wide, with French respondents on average regarding the low monetary value of a contract as being between Some Reason to Avoid Arbitration and a Strong reason to avoid arbitration. Moreover, while arbitration is often presented as involving a trade-off between cost and speed, French respondents evaluated the need for a speedy resolution of any disputes as less important for selecting arbitration than did respondents Survey-wide. Relatedly, when asked to compare the speed of resolving a dispute in arbitration with the speed of resolving the same dispute in litigation, both French respondents and respondents Survey-wide on average described arbitration as Slightly Faster than litigation, but the average for French respondents was at a lower level of this range.

These suggest that at the domestic level arbitration currently suffers from comparison with French courts. It is regarded as involving comparatively greater cost, but while it does give an advantage in speed, this advantage is not as much as provided in other States, and perhaps is not seen by domestic French parties as constituting an adequate trade-off for the extra cost that it is believed arbitration involves.

French law is well known for the strength of its division between the laws applicable to international arbitration and those applicable to domestic arbitration, and the indications are that this distinction is well made, as they do indeed appear to be distinct markets. Given the lack of broad endorsement of arbitration that already appears to exist domestically in France, application domestically of the very liberal approach to arbitration taken by French law and courts with respect to international arbitrations would likely further dampen domestic arbitration, as parties unfamiliar with arbitration would probably be concerned by the comparative lack of control French law and courts practice at the international level.

There is, however, a range of domestic arbitral institutions in France, and so although domestic arbitration in France is currently less developed than is international arbitration, it is certainly not dormant. If these institutions develop an approach to arbitration specifically tailored for the domestic French market, accepting the international/domestic distinction, rather than attempting to mirror France's more successful international arbitration market, there is no reason to think that domestic arbitration in France may not before long be just as popular as international arbitration, as the institutional infrastructure to support such a development is already clearly in place.

Focus

(i) Extension of arbitration agreements to non-signatories

In principle, an arbitration agreement is binding upon the signatories who expressly consented to be bound by its provisions. There are cases, however, in which arbitrators are asked to rule that certain parties who did not sign the arbitration clause underlying an arbitration should nonetheless be obligated to participate in the arbitration, and thereby be bound by the resulting award. For example, entities that are part of the larger corporate structure in which a signatory exists have in certain circumstances been held to be bound by an arbitration agreement they did not themselves sign. Additionally, entities may be bound by an arbitration agreement if it is found that the party signing the arbitration agreement was in reality merely acting as a proxy for the non-signing entity. The specific situations in which non-signatories can be bound by an arbitration agreement differ significantly between national jurisdictions.

French courts have confirmed that arbitration agreements can bind non-signatories, adopting an "objective" approach that does not require that the non-signatory party is willing to participate in the arbitration.⁶⁰ This objective approach is, however, qualified by the addition of a "subjective" criterion, which requires that the non-signatory was in fact aware of the existence of the arbitration clause. The subjective test is applied under the so-called "double-predictability" doctrine, which is designed to ensure that the expectations of both the original party to a contract and a non-signatory are protected. The non-signatory, that is, knowing of the existence of the arbitration agreement in the main contract, will be held to have had a legitimate expectation that any action it brought against a party to the contract relating to the contract would be resolved pursuant to the arbitration agreement.

This apparently strict rule, however, must be understood in the context of a 2012 judgement by the *Cour de Cassation*, in which it was held that a non-signatory was bound by an arbitration clause included in a contract because the non-signatory was "directly involved" in the performance of the contract. Importantly, the Court did not also specify whether or not the non-signatory had knowledge of the inclusion of an arbitration agreement in the contract.⁶¹ This suggests that French courts can in future be expected to

⁶⁰ Cass. Civ. 1, 26 October 2011, *Constructions mecaniques de Normandie (CMN) vs. Fagerdala Marine Systems (FMS)* and *Patroun Korrosionsschutz Consult und Consulting (PKC)*, no. 10-17708. See: Bonnard (2013), at 65.

⁶¹ Cass., 1 Civ., 7 November 2012; *Ibid* 16 p.68

take a very liberal approach to the question of who is bound by an arbitration clause, and may bind any non-signatory whose involvement in the performance of the contract was necessary for the contract's successful performance, whether or not there is direct evidence that the non-signatory was aware that the contract contained an arbitration clause.

(ii) Insolvency and arbitration

The focus of insolvency law on ensuring the equitable treatment of all creditors of an insolvent entity traditionally led to the view that insolvency terminated the validity of all arbitration agreements. An arbitration, after all, is a private dispute resolution system, and allowing one creditor to resolve its claim through arbitration, while all other creditors were obligated to submit themselves to the decisions of a bankruptcy court or administrator, appeared to privilege one creditor over the others. Currently, however, while there remain States in which the insolvency of a party to an arbitration agreement will automatically invalidate the agreement and terminate any related arbitration proceedings (e.g. Poland), in most Member States, including France, this is no longer the case.

The right of an insolvent party to arbitrate was established by the French *Cour de Cassation* in the *Pirelli* case, when the Court confirmed that access to justice through arbitration is governed by the same principles as apply in cases concerning access to court proceedings, as set out in Article 6 of the European Convention on Human Rights.⁶²

Major unresolved issues nonetheless remain. For example, the obligation of any arbitral institution or arbitrators specified in an arbitration agreement to ensure the principles of access to justice only apply if the institution and/or arbitrators accept their allocated roles. Where they refuse to participate in the arbitration, the arbitration agreement will fail, and the parties to the arbitration agreement will be precluded from entering into a new post-insolvency arbitration agreement, and must instead resolve their dispute in court.

Further questions exist, including the consequences of a failure of the parties and the arbitrators to agree on the arbitrators' fees in an *ad hoc* arbitration, and whether an insolvent party is under any obligation to attempt to secure third party funding in order to pay its portion of arbitration-related costs.⁶³ It is, however, to be expected that French courts will address such issues in accordance with their traditionally highly supportive approach to arbitration, and will resolve any such issues in the way most likely to facilitate the arbitration of insolvency disputes.

(iii) Unilateral arbitration agreements

A unilateral arbitration agreement is one in which only one party to the agreement is obligated to submit to arbitration disputes arising out of the agreement, with the other party remaining free to select either arbitration or an alternative forum. Such agreements have often been seen to raise important public policy concerns where they were concluded by parties of unequal bargaining power.

On 26 September 2012, in a decision not involving an arbitration clause (the *Rothschild* case), the French *Cour de Cassation* refused to enforce a unilateral forum selection clause that required one party to litigate in the Courts of Luxembourg, while the other was permitted to select either the domicile of the other party or "any other court of competent jurisdiction".⁶⁴ In its decision the Court emphasised in particular the "potestative" nature of the clause, meaning that the clause did not truly impose any obligations on the bank (since it could select any jurisdiction at all in which to litigate). As a result, the Court held that the

⁶² Cass. Civ. 1, 28 March 2013, *Pirelli & C. v. Licensing Projects*, no. 11-27770.

⁶³ Pinna (2013), at 486.

⁶⁴ Cass. Civ. 1, 26 September 2012, *Mme X v. Private Bank Edmond de Rothschild Europe*, no. 11-26022.

clause was contrary to Article 23 of Regulation No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Brussels I Regulation).⁶⁵

While the Court's interpretation of the Brussels I Regulation has been questioned, the *Rothschild* case has important implications for unilateral arbitration agreements, which bind only one party to arbitrate, while leaving the other party free to select any form of dispute resolution. The emphasis by the Court on the "potestative" nature of the clause in *Rothschild*, however, suggests that so long as an arbitration agreement binds both parties in some way (e.g. by obligating one to arbitrate, while allowing the other to select arbitration, but limiting its ability to litigate to certain jurisdictions), a unilateral arbitration agreement should nonetheless be upheld by French Courts.

Leading Arbitral Institutions

1. Arbitration and Mediation Centre of Paris (CMAP)

Visit: 13 June, 2014

Questionnaire: Responses included in Annex

2. Association Française de l'Arbitrage (AFA)

Visit: 13 June, 2014

Questionnaire: No responses received

3. European Court of Arbitration

Visit: Logistics of the Study precluded a visit to the Court

Questionnaire: No responses received

4. ICC International Court of Arbitration

Visit: July 7, 2014

Questionnaire: No responses received

5. International Arbitration Chamber of Paris

Visit: Logistics of the Study precluded a visit to the Chamber

Questionnaire: No responses received

1. Arbitration and Mediation Centre of Paris (CMAP)

Although the Arbitration and Mediation Centre of Paris (CMAP) was originally created as a mediation institution, and even today primarily focuses on mediation, it has recently increased its focus on arbitration, with the goal of developing further its role as arbitral institution. This mediation focus is important to recognise, as it significantly impacts the approach that CMAP has adopted to the administration of arbitrations. In short, CMAP presents itself as offering an alternative to traditional arbitral institutions, with a focus on the resolution of disputes, rather than on merely the delivery of an enforceable arbitral award.

By way of example, when parties file a request for arbitration at CMAP, CMAP representatives will consider if any potential benefit is to be gained from mediation, and may suggest mediation to the parties if the institution deems that mediation will help the parties resolve their dispute. CMAP may, therefore, be an attractive option for parties with prior experience of ADR, and who may need guidance as to the most appropriate dispute resolution method for the specific dispute that has arisen.

⁶⁵ OJ L 12/1, 16.1.2001.

Similarly, the mediation background of CMAP can also significantly influence the conduct of CMAP arbitrations, as many of CMAP's arbitrators are also mediators. This can have both positive and negative consequences, depending on the approach adopted by the specific arbitrator in a case. That is, having arbitrators with a mediation background can be useful as a means of assisting parties to reach a mutually-acceptable settlement, but it also raises the risk that less expert arbitrators may go too far and undermine their impartiality in pursuit of an agreement.

Notably, CMAP offers some ADR services that combine mediation and arbitration (Med-Arb). Med-Arb at CMAP is provided according to two different models. In the vast majority of cases, parties select traditional Med-Arb, in which they first attempt to mediate their dispute, and only upon the failure of mediation is arbitration initiated. CMAP also offers a second model, however, in which mediation and arbitration proceeding semi-concurrently, with mediation occurring in the gaps between scheduled hearings. While this second model has thus far been less popular with parties, it is an attractive alternative as it allows parties to continue in the context of developments in the arbitration hearings. This can be useful as parties may retain some information in traditional mediation, with an eye to presenting it any subsequent arbitration. In addition, this second model allows parties to negotiate in their growing understanding of the strength of their legal case. It should be emphasised, however, that in both model any information that parties disclose in the mediation phase cannot be used in the arbitration.

CMAP focuses on the domestic French market and not on international arbitrations. This policy is understandable, as the market of high-value international arbitration in Paris is dominated by the International Chamber of Commerce. However, this domestic focus encounters the difficulty that domestic arbitration in France is relatively underdeveloped. For this reason, administration of arbitrations is likely to remain a side activity of CMAP, its main focus being mediation.

CMAP's approach to administering arbitrations similarly reflects its mediation background, as it adopts a significantly more "hands on" approach than is the case for many arbitral institutions. By way of example, a representative of CMAP will be present when the terms of reference are drafted, defining the scope of the arbitration. In addition, the institution will closely monitor adherence to schedules, in order to ensure that agreed time limits are maintained. CMAP representatives will also review awards issued by arbitrators, although this review is limited to formal questions affecting the enforceability of the award, rather than to its substantive correctness.

CMAP has a list of arbitrators, and membership of the list is restricted to individuals approved by CMAP's arbitration committee. Potential arbitrators will be expected to have prior knowledge of arbitration, either through professional experience or through training, such training being offered by CMAP itself. Notably, CMAP also has a particular interest in younger arbitrators, who are seen to be more comfortable adapting to the alternative approach to arbitration that CMAP sees as its focus.

CMAP actively partners with other arbitral institutions, particularly the Chamber of Arbitration of Milan. The latter shares with CMAP a list of arbitrators and mediators, which the two institutions can use to identify appropriate individuals in their respective jurisdictions.

CMAP is trying to establish itself as an original model of an arbitral institution, primarily aiming at providing parties with a satisfactory resolution of their dispute, rather than simply ensuring that awards are valid and enforceable. This may not serve the needs of every party, particularly those experienced in arbitration, but its strong emphasis on the dispute resolution capabilities of arbitration gives CMAP a clear distinctiveness in the arbitration marketplace.

2. Association Française de l'Arbitrage (AFA)

Although the Association Française de l'Arbitrage (AFA) is based in Paris, it sees itself as an international arbitration institution rather than a regional one, and over 50% of the AFA's caseload is composed of international arbitrations. In addition, all of the AFA's caseload consists of commercial disputes.

The AFA's focus on international commercial arbitration ultimately originates in the rationale for its founding, as the AFA was established due to a dissatisfaction of a number of Parisian businesses with the services provided by the ICC. Specifically, while the competence of the ICC was not challenged, it was regarded as expensive and slow, and the extensive review of arbitral awards provided by the ICC was seen as increasing the risk of breaches of confidentiality. To a large extent, then, while the AFA is actively developing its own identity, its underlying structure can be understood as an attempt to create a smaller, and hence faster, cheaper, and more confidential, alternative to the ICC.

The AFA is ultimately much smaller than the ICC, and so may be appropriate for parties desiring more personal attention than a large institution such as the ICC is able to provide. It is difficult to be certain whether the AFA also achieves its goals of being faster and cheaper than the ICC, simply because of the significant differences in caseload between the AFA and the ICC, and because as the most prominent arbitral institution in the world, the ICC is far more likely than the AFA to receive larger and more complex cases. However, the AFA emphasises that 50% of the awards in AFA arbitrations are delivered within one year. While this is not as rapid as can be seen, for example, in the leading Spanish arbitral institutions, it is faster than is often the case in international arbitration. In addition, as might be expected given the AFA's emphasis on speed and efficiency, the AFA has an emergency arbitrator procedure, and 10% of all the AFA's cases make use of this procedure.

The AFA does not have a list of arbitrators and very rarely makes appointments. When asked to do so, the appointment is made based on the personal knowledge of the individuals on the AFA's Arbitration Committee. As the Committee is entirely composed of individuals located in Paris, it is unlikely to have the depth of knowledge of potential appointees in other jurisdictions that is possessed by the larger international arbitration institutions, however the international experience of the Committee's own members ensures an active knowledge of potential foreign arbitrators.

Notably for a small institution the AFA is also very active in its organisation of educational and similar activities. Moreover, the AFA played the leading role in the establishment of the Fédération des Centres d'Arbitrage, an association of 14 French arbitral institutions (but not the ICC), that is intended to promote institutional arbitration in France. It also works closely with the Comité Français de l'Arbitrage.

Unsurprisingly given the background to the AFA's founding, the AFA is in certain respects very similar to the ICC, and focuses on the international commercial arbitration market in which the ICC is predominant. There is clearly a market for this sort of institution, and the AFA's position within France indicates that it is capable of providing this sort of service. However, by comparison with the ICC, which has achieved a global presence and now rejects any conception of itself as in any way a French institution, the AFA clearly retains strong French ties.

It is, however, unclear precisely how the AFA perceives its own place within arbitration in France. One of the distinctive aspects of French arbitration, after all, is the fact that with the "internationalisation" of the ICC, France has been left without a truly major arbitral institution, despite the prominence of France within arbitration. This absence is likely a significant cause of the low levels of domestic arbitration in France. The AFA, however, is

also focused on the international market, and while it is actively engaged in educational and similar activities, its international focus limits the degree to which it can be expected to promote domestic arbitration in France.

Nonetheless, the involvement of the AFA in the Fédération des Centres d'Arbitrage, which includes as members a number of non-Parisian regional arbitration institutions, can potentially help in this respect. While the AFA only sees the Fédération as a means of promoting institutional arbitration in France, its existence raises the possibility of collaborative and federalised approach to French arbitration with the AFA perhaps serving as the France's "international arbitration" institution, and collaborating with more regional institutions in the development of arbitration within France. If this model comes to fruition it may indeed provide the development assistance that French domestic arbitration clearly requires.

3. ICC International Court of Arbitration

The ICC International Court of Arbitration (ICC) is unquestionably the leading arbitral institution in the world. While some other institutions may have larger caseloads, no other institution competes with the ICC in terms of market share for major commercial arbitration cases, or in terms of prestige within the field. Indeed, because of its dominant position other arbitral institutions tend to compare themselves with the ICC, emphasising either their similarity with the ICC in terms of quality and expertise, or their difference from the ICC in terms of cost, speed or perceived bureaucracy. In short, the ICC is generally acknowledged to set the benchmark in the administration of international arbitrations.

While the ICC is formally located in France, and its presence in France has clearly impacted the very pro-arbitration view of French courts and legislators, the ICC perceives itself today as ultimately a global institution, and as no longer having a genuinely substantive French connection. Indeed, in 2013 only 20% of new cases filed with the ICC were seated in France, with twelve States serving as a seat to 10 or more new arbitrations, five of those States being located outside the European Union. Similarly, in 2013 only 54.9% of arbitrators appointed in ICC disputes were of a Northern or Western European nationality, with a further 9.5% having United States or Canadian nationality, and 6.0% Central and Eastern European nationality.

The ICC does not maintain a formal list of arbitrators, and where called upon to make an appointment will usually do so through its network of national committees, with the relevant national committee proposing names to the central body. This mechanism is, in principle, well designed for an institution with as global a reach as the ICC, as it allows the ICC to make use of local expertise in the appointment of arbitrators for local disputes, and overwhelmingly works well. Nevertheless, the ICC is aware that not all local committees are of equal quality, and in 2012 the central Court gained the right to make direct appointments, thereby allowing it to bypass or minimise the importance of less effective national committees.

While a commonly heard criticism of the ICC is that it is both expensive and slow, it is unclear the degree to which this is merely a reflection of the cases the ICC receives, which are likely to be more complex than those administered by smaller institutions, or reflects the ICC's internal processes. The ICC itself aims at ensuring the timeliness of the arbitrations it administers, and while the size of the ICC's caseload (750-800 new arbitrations are commenced at the ICC each year) prevents the adoption of too "hands on" an administrative style, ICC case managers closely monitor arbitrations and attempt to insist on adherence to a timetable that is developed in consultation with the arbitral tribunal and the parties. The ICC's general rule is that awards should be delivered to the parties within three months of the end of hearings. While this rule cannot be directly

enforced, the ICC's fee structure gives it the flexibility to award higher or lower fees to arbitrators depending on how they have performed their work.

One of the most famous features of ICC arbitration is the scrutiny undertaken by the institution of any award delivered by a tribunal. Under the ICC's rules, every award issued by a tribunal, before being delivered to the parties, must be delivered to the ICC. It will first be reviewed by the counsel in charge of the arbitration in question, who will prepare a report. The award will also be reviewed by the Secretary General, the Deputy Secretary General, and the General Counsel of the Court. These four individuals will then determine whether the award should be submitted to the Court's monthly plenary session, or to one of its committees, which meet more regularly. Most awards are sent to a committee, with review at the plenary session reserved for particularly difficult cases. For any award sent to the plenary session a rapporteur is appointed to draft a further, more detailed report, and after discussion at the plenary session the Court's views are formulated and sent to the tribunal, although not to the parties. Importantly, scrutiny by the ICC will consider both the form of the award and its substance. However, tribunals ultimately retain the right to reject the ICC's comments.

The ICC is one of the few arbitral institutions benefiting from general recognition beyond arbitration specialists. As such, it is likely that a not insignificant portion of its caseload results not from parties who have made an informed decision to select the ICC as an administering institution, but merely from its status as the only arbitral institution of which they have heard. While parties in this situation will ultimately benefit from what is unquestionably a high quality institution, they may not have their arbitration administered in the way that would be best for the specific dispute and the parties involved. In this respect, the ICC is an important "safety choice" in the field, but a greater awareness beyond arbitration specialists of the other institutional choices available would clearly benefit both parties and arbitration as a whole.

Given its arguably uniquely international position in the field, it is unsurprising that the ICC also adopts an international approach in its non-administrative work, rarely interacting closely with national governments or local arbitration communities, and focusing instead on international institutions such as the United Nations Commission on International Trade Law (UNCITRAL) and the International Bar Association. Of course, the ICC retains some level of national involvement through its network of national committees, but as already mentioned the quality of these committees varies. Moreover, national committees are likely to be weaker precisely in those States in which improved arbitration practice and legislation is most needed. In this respect, while the ICC certainly undertakes valuable work at the international level, its overwhelmingly international focus also unquestionably has a downside. That is, as much as international standards are important for a transnational field such as arbitration, much of the practical reality of arbitration is still determined at a national level. The ICC's lack of engagement at that level, therefore, means the lack of a significant positive influence that might otherwise be brought.

2.2.12. Germany

Overview

Despite the longstanding high reputation of German law and practitioners, and the prominence of Germany's leading practitioners within the international arbitration community, Germany has not traditionally been one of the leading international centres for arbitration. This started to change with the adoption in 1998 of a new national arbitration law based on the UNCITRAL Model Law, and while Germany has not yet achieved the level of international recognition of the traditional leading arbitral nations (England, France,

Sweden and Switzerland), it is now clearly a prominent presence on the international arbitration scene.

Indeed, in the Survey of Arbitration Practitioners undertaken as part of this Study, when respondents were asked to select five States they would recommend as the seat of an international arbitration, 43.91% of respondents selected Germany, making it the fifth most preferred arbitral seat amongst the States included in this Study.⁶⁶ Notably, moreover, when predominantly German-speaking countries (Austria, Germany, Switzerland) were removed from consideration, Germany was still recommended by 38.27% of respondents, retaining its position as the fifth most preferred arbitral seat.

As already noted, Germany's current arbitration law is based on the 1985 UNCITRAL Model Law, and so is overwhelmingly consistent with contemporary views on the proper approach to the regulation of arbitration. Indeed, as discussed in the Focus section in this chapter, in some respects German law is more "arbitration-friendly" than the 1985 UNCITRAL Model Law, including both provisions not included in the Model Law until 2006, and provisions still not included in the Model Law. Perhaps unsurprisingly, then, German respondents to the Survey described German laws as more supportive of arbitration than did respondents Survey-wide on average with respect to their own national laws.

In addition to this formal support, however, German respondents also reported that German courts take a more liberal approach to the interpretation of both the validity and the scope of arbitration agreements than did respondents Survey-wide on average with respect to their own national courts. Moreover, while German respondents described German judges as having both a slightly lower level of understanding of arbitration and a slightly less positive attitude towards arbitration than did respondents Survey-wide on average with respect to judges in their own States, this description was hardly negative, with German judges described as having an understanding between Adequate and High, and as having an attitude towards arbitration between Neutral and Positive. One potential explanation for these slightly lower ratings, which appear initially at odds with the reported approach of German courts to questions of validity and scope, may be diversity amongst German courts regarding their levels of exposure to arbitration, and certainly to arbitration at the highest level. After all, while approaches to specific doctrines can be influenced by higher courts, even in a civil law jurisdiction, attitudes in general, and certainly levels of understanding, cannot be.

Nonetheless, despite its growing recognition at the international level, and the international practices of Germany's leading arbitration practitioners, German arbitration practice remains a predominantly regional affair. For example, of the cases brought over the past five years to the German Institute of Arbitration (DIS), one of the leading arbitral institutions in Europe, 64% have been domestic German arbitrations. Similarly, while German arbitrators are highly respected, and Germany's leading arbitrators have strong transnational practices, German respondents to the Survey who practice as arbitrators overwhelmingly reported that their appointments over the past five years have primarily come in arbitrations seated either in Germany itself, or in neighbouring or German-speaking States.

As already noted, German practitioners are highly regarded within the arbitration community, and Germany has adopted a legal regime that unquestionably strongly supports arbitration. The reality that German is not broadly spoken outside a small number of States has likely served as an obstacle to the international growth of German arbitration, as did increasingly-recognised problems with German arbitration law as it existed prior to

⁶⁶ Details of the responses provided to the questions in the Survey, both by respondents Survey-wide and specifically by respondents who identified Germany as their State, are included in an Annex to this Study.

1998. Since 1998, however, Germany has already secured a solid place immediately outside the traditional “big four” European arbitral seats, and with its favourable legal structure, expert practitioners, and strong arbitral institutions, it seems likely that Germany will continue to increase in popularity as a seat for international arbitrations.

Focus

(i) Broader application of German arbitration law as compared to the UNCITRAL Model Law

In Germany, arbitration is primarily governed by the German Arbitration Act, which came into force on January 1st, 1998, and forms the Tenth Book of the German Code of Civil Procedure (the “Tenth Book” or the German “CCP”).⁶⁷ The Tenth Book is applicable to all arbitration proceedings seated in Germany, irrespective of whether such arbitrations are of international or domestic character. Moreover, certain sections of the Tenth Book concerning support of the arbitral process apply irrespective of whether or not the seat of arbitration is within Germany. The Tenth Book is based substantially on the UNCITRAL Model Law on International Commercial Arbitration of 1985.. There are, however, a few areas of German arbitration law that diverge to some degree from the UNCITRAL Model Law, as reflected in the following examples.

There are several provisions of German arbitration law that are broader than the provisions of the UNCITRAL Model Law. They include, by way of example: (1) identical procedures applied to both domestic and international arbitrations, (2) broader applicability of the Tenth Book regardless of whether the transaction underlying the dispute can be characterised as commercial in nature, (3) fewer formal requirements for the existence and validity of arbitration agreements, and finally (4) a different procedure to be followed by arbitrators when determining the applicable law in circumstances in which the parties have not agreed on which substantive law is to apply.

First, the scope of application of German arbitration law is broader than in the case of the provisions of the UNCITRAL Model Law, since the Tenth Book is applicable to *all* arbitrations having a seat in Germany. This means that the German CCP applies to arbitration proceedings irrespective of whether they concern international or domestic disputes (though there are different rules governing the enforcement of domestic and foreign awards). By contrast, the UNCITRAL Model Law applies solely to international arbitration. As a result, German arbitration law avoids the occasionally difficult distinction between national and international cases, as German legislators rejected the argument, endorsed by some States, that domestic arbitration should be regulated separately from international arbitration, as domestic arbitration is more likely to involve vulnerable or unsophisticated parties. It should, however, be emphasised that such parties can also be protected by other aspects of German law (e.g. Section 1034 of the German CCP, which allows a party to request that a State court appoint the arbitrator or arbitrators where the method of appointment originally agreed gives the other party excessive control over the appointment process).

Second, whereas the UNCITRAL Model Law is specifically limited to “commercial arbitration”, the Tenth Book of the German CCP is applicable irrespective of whether the transaction underlying the dispute is characterised as commercial. In fact, the scope of arbitrable disputes in Germany is relatively broad, as in principle any claim involving an economic interest may be the subject matter of an arbitration (Section 1030 (1) of the German CCP). The exceptions involve divorce, child custody matters, issues of family

⁶⁷ Code of Civil Procedure as promulgated on 5 December 2005 (Bundesgesetzblatt (BGBl., Federal Law Gazette) I page 3202; 2006 I page 431; 2007 I page 1781), last amended by Article 1 of the Act dated 31 August 2013 (Federal Law Gazette I page 3533).

status, criminal law matters, disputes regarding the existence of residential leases, and certain issues concerning the land title register and the company register.

Third, as far as the formal requirements related to arbitration agreements are concerned, Section 1031 of the German CCP regulates the existence and validity of the arbitration agreement in a less onerous manner than the corresponding provisions contained in the UNCITRAL Model Law. In terms of form, an arbitration agreement must be in writing (i.e. part of a signed contract or contained in an exchange of letters, telefaxes or other written communication such as email that provides a record of the arbitration agreement), as is also required by Article 7(2) of the UNCITRAL Model Law. However, unlike the UNCITRAL Model Law, the requirements regarding the form of an arbitration agreement under German arbitration law are met if the arbitration agreement is included in a document sent by one party to its counterparty or by a third party to both parties to a dispute, provided that a part of such document is considered a contract in accordance with trade usages, and it is not objected to by the receiving party in due time (Section 1031(2) of the German CCP). As a result, arbitration agreements concluded orally and later confirmed by one party in a confirmation letter fulfil the formal requirements for arbitration agreements under German arbitration law, without any further written confirmation by the other party.

It should also be noted that the form requirements for arbitration agreements set forth under Article II of the New York Convention on the Recognition and Enforcement of Arbitral Awards 1958 (New York Convention of 1958) are considerably narrower than those contained in Section 1031 of the German CCP. As such, some controversies arise in respect of the recognition and enforcement of foreign arbitral awards in Germany. In this context, the German Supreme Court (Bundesgerichtshof or BGH) held that due to the most favourable treatment rule contained in Article VII of the New York Convention of 1958, a foreign award is enforceable in Germany if the underlying arbitration clause complies with Section 1031 of the German CCP, notwithstanding its non-compliance with Article II of the New York Convention of 1958 or, as the case may be, with the requirements applicable at the seat of the arbitration (BGH, September 30, 2010, III ZB 69/09, BGHZ 187, 126, ann. 6 et seq.).

Finally, in circumstances where the parties have not agreed on the law applicable to the substance of their dispute, Section 1051 of the German CCP compels the arbitral tribunal to apply the substantive law of the state with which the subject matter of a dispute is most closely connected. This is in contrast with the provisions on applicable law as set out in Article 28 of the UNCITRAL Model Law, which provide that, in the absence of the parties' choice of the applicable law, the arbitral tribunal shall apply the law determined by the conflict of laws rules that it considers applicable.

(ii) Far-reaching judicial support of the arbitral process in Germany

The Tenth Book of the German CCP entails more far-reaching court intervention in the arbitral process than is provided for in the UNCITRAL Model Law. Under Section 1062 of the German CCP, original subject matter jurisdiction over all arbitration matters lies with the Higher Regional Courts ("*Oberlandesgerichte*," courts of second instance in regular litigation proceedings), excluding support for the taking of evidence that falls within the competence of local courts ("*Amstgerichte*"). This serves both to concentrate expertise in a smaller number of high-level courts, and to limit the available review process.

By comparison with the 1985 UNCITRAL Model Law, court assistance available under the Tenth Book includes not only the taking of evidence, but also "other judicial acts" (Section 1050 of the German CCP). Section 1041 of the German CCP contains additional provisions relating to interim measures, aimed at ensuring that the interim relief granted by an arbitral tribunal will be enforceable by state courts. Pursuant to Section 1041(1) of the

German CCP, an arbitral tribunal may award, upon a party having filed a corresponding petition, provisional measures or measures serving to provide security as it deems fit with a view to the subject matter of the dispute. Furthermore, an arbitral tribunal may demand, in connection with such measure, that each of the parties provide reasonable security. Upon a petition being filed with a state court by a party to an arbitration, a state court may grant the enforcement of an interim measure awarded by a tribunal by way of providing for a different wording of the requested measure should it be required by the enforcement procedure (Section 1041(2) of the German CCP). That is, a state court may recast the order for an interim measure issued by an arbitral tribunal so that it complies with the necessary form for such an order under German civil procedure law. To this extent, the Tenth Book addresses a gap in the 1985 UNCITRAL Model Law by expressly empowering German state courts to enforce interim measures ordered by an arbitral tribunal, as is now explicitly allowed by the 2006 UNCITRAL Model Law.

Lastly, it is important to stress that Section 1034 of the German CCP provides that where the arbitration agreement disadvantages one party as regards composition of the arbitral tribunal, such party may seek appointment of an arbitrator or arbitrators by a state court in a manner different than occurred or was originally agreed. The UNCITRAL Model Law does not contain such provision. While such a provision is an effective means of protecting less powerful parties from potentially unbalanced arbitral procedures, it potentially also provides a mechanism for abuse by parties unhappy with an arbitral procedure to which they previously agreed. It must, therefore, be carefully applied by courts, with an eye to balancing protection of parties from genuinely unfair arbitral procedures, against respecting the integrity of arbitration agreements. Indications are that German courts are indeed careful in this respect.

(iii) Declaration of admissibility or non-admissibility of the resort to arbitration

Under Section 1032(1) of the German CCP, local courts are obligated to reject an action as inadmissible where the court action relates to a matter that is the subject of an arbitration agreement, and where the respondent has raised an objection to the local court's jurisdiction prior to the hearing on the merits of the dispute. The only exception to this rule is when the court determines that the arbitration agreement is null and void, inoperative or incapable of being performed. Because of this provision, German courts refuse to hear disputes that are covered by a binding arbitration agreement, except in exceptional circumstances.

More distinctively, pursuant to Section 1032(2) of the German CCP, which has no counterpart in the UNCITRAL Model Law, it is possible to apply to a court for a declaration of admissibility or non-admissibility of resort to arbitration at any time prior to the constitution of an arbitral tribunal. This provision serves as a counterpart to Section 1032(1), which benefits claimants in an arbitration. While Section 1032(2) is available to both claimants and respondents in an arbitration, and provides an important means for claimants to secure certainty regarding the validity of their arbitration agreement, it also provides likely respondents in an arbitration the ability to secure confirmation on the forum in which their dispute must be heard. The increased certainty that this provides, structured as it is in a way that does not impede or delay the arbitral process, is a significant improvement over the provisions of the Model Law.

Leading Arbitral Institutions

1. Arbitration Court of the Frankfurt Chamber of Commerce and Industry (FIAC)

Visit: Logistics of the Study precluded a visit to the Court

Questionnaire: No responses received

2. Chinese European Arbitration Centre (CEAC)

Visit: It was not possible to arrange a visit to the Centre

Questionnaire: No responses received

3. Court of Arbitration of the Hamburg Chamber of Commerce

Visit: 25 July, 2014

Questionnaire: Responses included in Annex

4. DIS (German Institute of Arbitration)

Visit: Scheduling conflicts precluded a visit to the Institute

Questionnaire: Responses included in Annex

5. German Maritime Arbitration Association (GMAA)

Visit: 25 July, 2014

Questionnaire: No responses received

1. Court of Arbitration of the Hamburg Chamber of Commerce

The Court of Arbitration of the Hamburg Chamber of Commerce is one of the oldest currently-operating arbitral institutions in the world. Originally founded in 1893, the Court developed out of the needs of Hamburg's international trading community, which saw arbitration as a means of avoiding foreign courts, while providing access to an enforceable decision. While the Court has obviously developed since that time, its caseload remains focused on the business community of Northern Germany, although this entails that a significant number (roughly half) of the arbitrations it administers are international arbitrations. The Hamburg Chamber of Commerce also administers, under contract, cases submitted to the Chinese European Arbitration Centre (CEAC) and to the Court of Arbitration of the German Coffee Association.

The Court's approach to the administration of arbitrations mirrors its origins, and includes some highly distinctive features. Most notable in this respect is the high degree of involvement of the institution in the arbitral proceedings it administers. Most prominently, the Court will send as a "legal advisor" to each arbitration one of the two leading individuals in the institution. While some other arbitral institutions also send representatives into hearing, the Hamburg Court's approach is distinctive because of the level of involvement of the legal advisor in the proceedings. Specifically, while the legal advisor does not act as a decision-maker, and so does not participate in the actual resolution of the case, he or she will participate actively in the hearings, including speaking and asking questions. In addition, he or she will discuss the substance of the case with the arbitrators prior to their decision – although again, the arbitrators remain free to decide the case themselves. Even more unusually, the active participation of the legal advisor in the proceedings is reflected in the fact that the Court receives a portion of the fees that would normally be received by the arbitrators. That is, if the arbitral tribunal is composed of three members, the fees paid by the parties are split four ways, instead of three, with the three arbitrators and the Court each receiving one quarter. Although this results in arbitrations receiving lower remuneration than would normally be the case, the Court has not found this to be an obstacle to securing arbitrators, and reports never having had an arbitrator refuse an appointment because of this requirement.

The active participation of a legal advisor in the proceedings is a long-term feature of arbitration at the Court, deriving from its early beginnings. One likely explanation for it, then, is that historically parties to an international trade dispute would often appoint a fellow business person or other expert as an arbitrator, rather than a lawyer. In such a case the provision by the Court of a specialised legal advisor would be highly desirable.

Although it is less clear that such a justification exists in the contemporary arbitration world, in which arbitrators are overwhelmingly lawyers, the willingness of arbitrators to participate in this model indicates that it is clearly accepted within the Hamburg community as a desirable feature of the Court's practice.

This ongoing acceptance of such an unusual feature may be tied to the particular caseload of the Court, which, as already noted, centers on the Northern German business community. The involvement of a legal advisor could, for example, be desirable in a dispute between two parties likely to be engaged in further trade in the future, as a means of ensuring that the proceedings do not become overly antagonistic. Similarly, the involvement in arbitrations at the Court of a significant number of Chinese parties, who can be uncomfortable with European approaches to dispute resolution, might also support active presence of an institutional figure, able to ensure the proceedings operated in a fashion acceptable to both parties.

It should, however, be acknowledged that while this approach to arbitration is clearly accepted in the community in which the Court operates it is not without its complications. The active involvement of the legal advisor in the proceedings, for example, raises questions about the clear delineation between the contents of the mandate concluded between the parties and the arbitrator(s), and the contents of the administration contract between the parties and the Court. Generally, arbitrators assume the obligation to decide the dispute, whilst the administering institution limits its activities to supporting the proceedings. In the case of the Court, however, the boundaries between these two roles have arguably been blurred, as demonstrated by sharing of the institution in the arbitrators' fees. As a result, it is unclear whether the legal advisor and the institution should be subject to the same regime of civil liability as the arbitrators, inasmuch as the advisor contributes to the hearings and discusses the merits of the dispute with the members of the tribunal.

The Hamburg Court is a small institution, but an example of an institution designed to operate within a very specific community. While its approach to the administration of arbitrations is most likely unique, and certainly unorthodox, it appears to be clearly accepted within the business community of Northern Germany, and provides to that community an approach to dispute resolution that is simply not available at any of the larger and more prominent institutions.

2. German Maritime Arbitration Association (GMAA)

While the world of maritime arbitration is currently dominated by the London Maritime Arbitrators Association (LMAA), Hamburg has a long history as a place for maritime arbitration. The German Maritime Arbitration Association (GMAA) was founded by the Hamburg arbitration and maritime communities in order to revive Hamburg's position in maritime arbitration, and to provide an effective alternative to arbitration at the LMAA.

Maritime arbitration has a distinctive structure, as it more closely resembles *ad hoc* arbitration than it does institutional arbitration, even when it is formally handled by an institution. The structure of arbitration at the GMAA reflects this reality. The arbitration rules of the GMAA, for example, are intentionally short, and much shorter than most institutional arbitration rules. This is a reflection of the fact that traditionally many maritime arbitrators have been business people, rather than lawyers, and so preferred simple and concise rules. While this is no longer the case, and maritime arbitration is now dominated by lawyers, just as is regular commercial arbitration, the tradition of simple and concise rules nonetheless remains.

In addition, in a conscious alternative to arbitration at the LMAA, the GMAA rules do not provide for significant disclosure of documents between parties, in recognition of the fact that many civil law users are uncomfortable with the level of document disclosure traditional in common law systems. The GMAA rules aim at striking a balance between the common law and civil law cultures on this point, and so while providing that no general duty of disclosure exists, they nonetheless permit arbitrators to request any documents needed to resolve the dispute.

Although the GMAA tries to provide an alternative to the LMAA, and to shape its activities in a way attractive to the maritime community, its ability to do this is seriously limited by the fact that arbitral institutions realistically play a very marginal role in maritime arbitration. As already noted, ultimately maritime arbitration is best understood as a form of *ad hoc*, with the involvement of arbitral institutions being limited to the adoption of arbitration rules and the appointment of arbitrators if required. All other aspects of the proceedings are managed autonomously by the arbitrators and the parties, with no involvement of the GMAA. Moreover, while the rules of the GMAA require that parties using the GMAA rules register their arbitration with the GMAA, and submit to the GMAA a copy of the final award, this is often not done.

In a reflection of the closeness of the maritime arbitration community in Hamburg, when the GMAA is requested to appoint an arbitrator, which occurs approximately twice a year, it does not rely upon a list of maritime arbitrators, but instead makes the appointment by drawing on the personal knowledge and expertise of the Chairperson. This is possible because maritime arbitration in the Hamburg region revolved around a small network of practitioners, almost all of whom are GMAA members. Former judges with a specialised background in maritime disputes are also often appointed.

While the GMAA's involvement in the arbitrations conducted under its rules may be limited, it is very active as a proponent of maritime arbitration, both in terms of training new practitioners and promotional activities. It regularly offers, for example, an "Academy" that provides half-day seminars for beginners in the field, as well as an "Expert Workshop" aimed at more experienced professionals and judges. The involvement of judges in this latter event is particularly notable, as the workshop format allows open discussion of a topical issue in maritime arbitration, thereby ensuring both that judges are well-informed about the field, and that the results of the workshop are informed by the input of the judges who ultimately perform a crucial function in the success of any maritime arbitration. In addition to these activities, the GMAA also organises mock arbitrations, both in Germany and abroad.

It is notable, and reflective of the enhanced importance of parties in maritime arbitration, that around half of the attendees at the GMAA's events are not lawyers, but other actors in the maritime field, such as ship owners, insurers etc. This is a significant difference from commercial arbitration events, which are predominantly attended by lawyers (either in-house or external counsels).

The GMAA is arguably best understood as a facilitator of *ad hoc* arbitration within a particular industry, rather than as an arbitral institution in the traditional sense. This is, though, not a criticism of the GMAA, as it is the model of arbitration that the maritime community prefers. Indeed, although this reality limits the number of ways the GMAA can distinguish itself from its competitors, and so significantly impedes the ability of the GMAA to develop in a field clearly dominated by the LMAA, it is nonetheless an approach to administration of arbitrations that the GMAA needs to maintain. While maritime arbitral institutions perform a very limited role in the arbitrations held under their rules, the maritime community has clear preference for institutions seen as part of their community, rather than for traditional commercial arbitration institutions. Because of this, if the GMAA

changed its approach in an attempt to separate itself more clearly from the LMAA it would risk losing its appeal in the maritime world.

2.2.13. Greece

Overview

The international prominence of Greece within the maritime shipping industry, combined with the reportedly high levels of use of arbitration to resolve maritime disputes, would suggest that Greece should have a thriving arbitration industry. However, while arbitration is certainly far from unknown in Greece, it remains a specialised practice, and Greece has obtained very little recognition internationally as an arbitral seat.

The apparent relative underdevelopment of arbitration in Greece can be seen in several of the responses given by Greek respondents to the Survey of Arbitration Practitioners undertaken as part of this Study.⁶⁸ Greek respondents, for example, on average reported spending longer in their careers before their first involvement in arbitration than did respondents Survey-wide. Similarly, arbitration was not the primary field of work for a larger proportion of Greek respondents than was the case with respondents Survey-wide, and amongst those for whom arbitration was their primary field of work, Greek respondents reported spending longer in their profession before arbitration became their primary field of work than did respondents Survey-wide. In addition, Greek respondents on average reported spending less of their time on arbitration matters than was reported by respondents Survey-wide.

One likely explanation for this apparent underdevelopment of Greek arbitration is a combination of certain features of Greek law and the relationship between arbitration and Greek courts, both of which are discussed further in the Focus section of this chapter. Greek respondents to the Survey, for example, while not describing the Greek laws applicable to arbitration in negative terms, did describe Greek law as being less supportive of arbitration than did respondents Survey-wide with respect to their own national laws.

In turn, Greek respondents described Greek courts as being less liberal in their interpretation of both the validity and the scope of arbitration agreements than did respondents Survey-wide on average with respect to the courts in their own States. More broadly, Greek respondents described Greek judges as having both a lower understanding of arbitration and a less positive view of arbitration than did respondents Survey-wide on average with respect to judges in their own States. Moreover, Greek respondents reported the enforcement of both domestic and foreign arbitral awards in Greek courts taking on average 7-12 months, a longer period than reported by respondents Survey-wide with respect to the enforcement of awards in their own States.

The difficulties impeding the development of arbitration in Greece do not, however, appear to result entirely from the legal and institutional structure within which it operates. For example, although Greek respondents reported arbitrating a dispute in Greece as being between Slightly Faster and Much Faster than litigating the same dispute in Greek courts, they also reported both the domestic and the international arbitrations in which they have been involved over the past five years taking longer than was reported by respondents Survey-wide, with domestic arbitrations taking on average 1-2 years, and international arbitrations taking on average 2-3 years. Relatedly, Greek respondents also reported arbitrators in both the domestic and the international arbitrations in which they have been

⁶⁸ Details of the responses provided to the questions in the Survey, both by respondents Survey-wide and specifically by respondents who identified Greece as their State, are included in an Annex to this Study.

involved over the past five years taking longer to deliver final awards after the end of hearings than was reported by respondents Survey-wide.

Arbitration in Greece, then, currently appears to suffer both internal and external obstacles to its development. Greek courts are not hostile to arbitration, but yet neither do they support it. Similarly, while Greek law has created some difficulties for arbitration, as discussed further in the Focus section of this chapter, it is also not regarded by Greek respondents as seriously problematic. However, unlike a country such as Spain, where the slowness of Spanish courts has allowed arbitration to develop significantly by emphasising speed, arbitration in Greece, while reportedly faster than Greek courts, nonetheless appears to replicate some of the delays that litigation in Greek courts can entail. It is undoubtedly for all of these reasons that when asked to recommend five seats for an international arbitration, only 56.25% of Greek respondents recommended Greece. Until at least the internal problems facing Greek arbitration are addressed, that number seems unlikely to improve.

Focus

(i) Distinction between domestic and international arbitrations, and annulment for improper procedure

In Greece two parallel legal frameworks exist, covering both domestic and international arbitration proceedings. The distinction is based on the nature of the dispute involved or the wording of the arbitration agreement entered into by the parties. Domestic arbitration in Greece is governed by Articles 867-903 of the Greek Code of Civil Procedure (CCP) of 1985, with recent amendments dated 1995, 2001, 2002 and 2012. International arbitration proceedings are regulated by the Law No. 2735/1999.

The two systems are quite similar in substance, however, while parties are generally free to decide on the procedural rules that will govern both domestic and international arbitrations, subject to mandatory rules of law (Article 19 of Law 2735/1999), the law applicable to international arbitrations contains more flexible provisions on procedure, while the domestic arbitration regime is generally stricter. Because of the stricter rules included in the domestic arbitration regime, the parties' choices of procedural rules may have significant implications for the annulment of arbitral awards by the Greek courts, as the parties may rely on the flexibility allowed them under the law applicable to international arbitration, only to have a court subsequently declare that their arbitration was domestic, and was therefore conducted in a manner in violation of the applicable law.

This possibility has become particularly prominent because Greek civil courts tend to investigate *ex officio* whether an arbitration should be classified as domestic or international, both in cases in which the parties themselves have raised no objections on the matter, and in situations in which the parties have expressly agreed on the international nature of the arbitration proceedings. This practice can be problematic because where the courts find that the parties should have followed a court procedure other than the one they did in fact follow (i.e. that they should have adhered to the provisions regulating domestic arbitration, rather than the law governing international arbitration), the arbitral award may be annulled under Article 34 of Law 2735/1999 or Article 897 of the CCP, even if it is flawless in all other respects.

This practice imposes a significant obstacle to international arbitration in Greece, as parties agreeing to Greece as the seat of an international arbitration may face the risk that their arbitration will subsequently be held to be domestic, with an otherwise irreproachable award being annulled because procedures were adopted that were acceptable under the law applicable to international arbitration, but not under that applicable to domestic

arbitration. Moreover, because Greek courts undertake this examination even where the parties have expressly agreed that their arbitration is international, parties possess no ability to eliminate this risk.

(ii) Substantive review of arbitral awards by the Greek courts

Article 897 of the Greek CCP sets out limited and specific grounds under which the Court of Appeal in the district in which the award was issued can annul a domestic arbitral award. The circumstances for the annulment of domestic arbitral awards involve, *inter alia*, situations in which the procedure was breached, where the arbitrators exceeded their jurisdiction or rendered an arbitral award in continuation of the arbitration agreement that was null or ineffective, or when the public policy was violated. Civil courts are, therefore, required to test the compliance of arbitral awards with the formal requirements enshrined in Article 897 of the Greek CCP, rather than interfere with the substantive issues examined and determined by arbitrators.

Despite these restrictions, in several cases decided by the Greek civil courts judges have scrutinized the substantive aspects of arbitral awards and re-evaluated the substance of the case. These decisions, although admittedly isolated, raise significant questions about judicial review of arbitral awards in Greece. Such questions will remain until the judicial system itself, in the form of judgments from higher courts, expressly adopts a guideline of non-interference in the substance of arbitral awards. Connected as it is to the views of judges, rather than the formal structure of the law, this is likely to be a long-standing problem in Greece.

(iii) Restrictions regarding arbitrators' remuneration

Another issue that has received considerable attention in the Greek arbitration community concerns restrictions that have been placed on the remuneration of arbitrators.

According to Article 882A of the Greek CCP, which applies to both domestic and international arbitrations, arbitrator's fees are subject to a cap. This cap is calculated on a case-by-case basis, based on the amount in dispute in a proceeding. In any case, the remuneration of arbitrators cannot exceed the amount of €44,000 in domestic arbitrations and €59,000 in international arbitration. In addition, arbitrator's fees in Greece are subject to other reservations, including the requirement to deduct 25% of an arbitrator's remuneration to support the Fund for the Financing of Judicial Buildings (called 'ΤΑΧΔΙΚ' in Greek).

While the amounts contemplated by the cap on arbitrator's remuneration are not small, they are significantly less than would be expected for many disputes at the international level. Under the fee schedule of the International Chamber of Commerce, for example, the leading international arbitral institution, an arbitrator serving as sole arbitrator in a case in which the amount in dispute is approximately €3m will receive a fee between €22,000 and €96,000, with an average fee of €59,000. In 2013 46% of ICC arbitrations concerned matters in dispute of over €3.7m (US\$5m).

This restriction, therefore, will clearly deter experienced arbitrators from accepting appointments to sit on arbitration panels in Greece, as far higher fees are available abroad. In addition, particular problems will arise for complex and time-consuming arbitration proceedings in which the financial amount in dispute does not fully reflect the amount of time and effort that will be required from an arbitrator, even though it is in such complex proceedings that the most experienced and able arbitrators are required.

Leading Arbitral Institutions

1. Department of Arbitration, Athens Chamber of Commerce and Industry
Visit: Logistics of the Study precluded a visit to the Department
Questionnaire: Responses included in Annex

2.2.14. Hungary

Overview

Hungary has a long history of arbitration, with arbitration being given formal recognition in Hungarian law since the beginning of the twentieth century. Nonetheless, while individual Hungarian arbitration practitioners have achieved international recognition, Hungary has yet to develop a prominent place within international arbitration. Moreover, recent legislative action taken in Hungary, as discussed in more detail in the Focus section of this chapter, raises serious concerns about the ability of Hungary to maintain its adherence to accepted international standards for the regulation of arbitration.

Hungarian respondents to the Survey of Arbitration Practitioners undertaken as part of this Study reported on average that arbitration constituted a similar proportion of their work as was reported by respondents Survey-wide, indicating the existence within Hungary of an active engagement with arbitration.⁶⁹ Similarly, Hungarian respondents on average reported becoming involved in their first arbitration after a period of time equivalent to that reported on average by respondents Survey-wide, approximately the same proportion of Hungarian respondents indicated that arbitration was not their primary field of work as was the case with respondents Survey-wide, and amongst those for whom arbitration was their primary field of work, Hungarian respondents on average reported spending a similar length of time in practice before arbitration became their primary field of work as was reported on average by respondents Survey-wide.

Indications are, then, that Hungary has a relatively active arbitration community, which in some central respects resembles that of arbitral communities in States across the European Union/Switzerland. Notably, however, while Hungarian respondents on average described international commercial arbitration as constituting the same proportion of their arbitration work as did respondents Survey-wide, Hungarian respondents also reported domestic commercial arbitration constituting a higher proportion of their practice than did respondents Survey-wide. In addition, Hungarian respondents who practice as arbitrators reported a relatively regional practice, with only five States (Austria, France, Germany, Hungary, Switzerland) having served as the seat of an arbitration over the past five years for more than one arbitrator.

Arbitration practice in Hungary also has some notable features. For example, Hungarian respondents on average reported both the domestic and the international arbitrations in which they have been involved over the past five years taking equivalent periods of time as was reported by respondents Survey-wide. More notably, Hungarian respondents on average reported final awards being delivered more quickly in both the domestic and the international arbitrations in which they had been involved over the past five years than did respondents Survey-wide. Hungarian respondents also on average reported the enforcement of both domestic and foreign arbitral awards in Hungary being faster than did respondents Survey-wide.

Arbitration in Hungary, that is, appears to be a professional activity undertaken at a standard that, at least with respect to speed, compares favourably with arbitration practice

⁶⁹ Details of the responses provided to the questions in the Survey, both by respondents Survey-wide and specifically by respondents who identified Hungary as their State, are included in an Annex to this Study.

across the European Union/Switzerland. It is notable, therefore, that when asked to recommend five States in which to seat an international arbitration, only 72.73% of Hungarian respondents selected Hungary, making it a less popular selection amongst Hungarian respondents than Switzerland, and no more popular than Austria, France and Germany. Moreover, only 1.30% of respondents Survey-wide, including only two non-Hungarian respondents, recommended Hungary as a preferred arbitral seat. Despite an apparent conformity with international standards in important respects, that is, and a national arbitration law based on the 1985 UNCITRAL Model Law, and so overwhelmingly reflective of contemporary views on the regulation of arbitration, arbitration in Hungary suffers from a relatively weak reputation.

Indications of the cause of this reputation can be seen in the responses given by Hungarian respondents to questions about the institutional structure within which arbitration operates in Hungary. For example, even though Hungary's arbitration law is based on the 1985 UNCITRAL Model Law, Hungarian respondents described Hungarian law as between Neutral and Unsupportive of arbitration. Similarly, Hungarian respondents described Hungarian legislators as having a Low understanding of arbitration, and a Negative attitude towards it. These views are consistent with recent legislative action undertaken in Hungary, as discussed further in the Focus section of this chapter, which has caused considerable concern in the Hungarian arbitration community.

In addition, however, Hungarian respondents also regarded Hungarian judges as less supportive of arbitration than did Survey-wide with respect to judges in their own States. Hungarian respondents, for example, on average described Hungarian courts as being stricter on the scope of arbitration agreements than did respondents Survey-wide with respect to their own national courts. More broadly, Hungarian respondents described Hungarian judges as having both a lower understanding of arbitration and a less positive attitude towards arbitration than did respondents Survey-wide with respect to judges in their own States.

Arbitration in Hungary, that is, appears currently to involve an active and competent set of arbitration practitioners, but who are operating in an institutional context in which distrust of arbitration is high, and active attempts are being made to limit arbitration's use. Particularly given the willingness of the Hungarian legislature to enact new laws restricting in significant ways the use of arbitration in Hungary, this has to be seen as a cause of long-term concern for Hungarian arbitration.

Focus

(i) Limitations to Freedom to Establish and Choose Arbitral Institutions

Hungarian law largely conforms to the 1985 UNCITRAL Model Law, which was implemented with Act LXXI of 1994 on Arbitration (hereinafter: Hungarian Arbitration Act or HAA).⁷⁰ Because of this, private autonomy is generally protected, and parties are free to appoint their arbitrators according to the terms of their arbitration agreement, and to select the applicable rules of procedure. There is, however, a significant exception to this general

⁷⁰ The 2006 amendment to the Model Law has not been adopted. Therefore, the HAA still reflects the original concepts of the UNCITRAL Model Law, with some peculiarities. The HAA is an act of the Parliament, separate from the Code of Civil Procedure (Act III of 1952), and contains regulations on both domestic and international arbitration: Chapters I to V of the HAA provide for domestic arbitration, but the rules laid down in those Chapters are also applicable to international arbitration, unless otherwise provided in Chapter VI. International arbitration is expressly defined in Chapter VI of the HAA. According to the established case law of Hungarian courts, the rules of civil procedure are not applicable to the arbitration procedure, unless the parties agree otherwise or the arbitral tribunal is entitled to determine the procedures (or a certain procedural rule) to be followed and decides to resort to the rules of civil procedure.

rule: Hungarian law significantly limits the freedom to establish and choose arbitral institutions.

With respect to establishment, unless otherwise provided for by an act of the Parliament, only the economic chambers (public entities recognized by the law) may establish an arbitral institution. The oldest and most important arbitral institution in Hungary is the Arbitration Court attached to the Hungarian Chamber of Commerce and Industry (HCCI Arbitration Court). In addition to the HCCI Arbitration Court, there are only a few other specialized arbitral institutions such as the Arbitration Court for Energy, the Arbitration Court for Monetary and Capital Markets, the Arbitration Court for Telecommunications and the Arbitration Court for Sports.

While this may appear to be only a minor limitation, it must be seen in the context of additional restrictions that exist on the freedom of parties to select arbitral institutions, as within the territorial scope of application of the HAA, the HCCI Arbitration Court has exclusive jurisdiction to administer international arbitration, unless otherwise provided by an act of the Parliament. In other words, if the parties decide to refer their international dispute(s) to an arbitral institution having its seat in Hungary, they must select the HCCI Arbitration Court as the administering institution, unless there is an Act specifically allowing the parties to choose another institution.

This is a notable structural problem with the Hungarian system, since it makes it impossible for other arbitral institutions to be established in Hungary to administer international arbitral proceedings. As a result, parties are forced to accept the approach to administration of arbitrations adopted by the HCCI. The HCCI is a respected institution in Hungary, but not every dispute is best handled in the same way, and the ability of parties to choose from among competing arbitral institutions is a primary benefit offered in the arbitral market in all leading arbitration States.

(ii) Limitations on Arbitrability of State Property and Real Estate Disputes

Even though the material scope of application of the HAA is not confined to commercial arbitration, disputes are only arbitrable under the HAA where at least one of the parties is professionally engaged in business activities, the dispute arises out of or in connection with this activity, and the parties are permitted by the law to dispose freely of the subject-matter of the dispute.

The following disputes are explicitly excluded from the scope of arbitrability:

- family matters;
- the judicial review of administrative decisions;
- remedy for privacy right violations committed by the media;
- labor matters.

In addition, in 2012 the above limitations were supplemented by an additional restriction on arbitrability: if the subject-matter of the dispute is a national asset (i.e., all property owned by the State, tangible or non-tangible, as well as the rights, claims and privileges related to such property), as defined in Act CXCVI of 2011 on National Assets, and is located within the boundaries of Hungary, the dispute may not be submitted to arbitration. This limitation applies even where the dispute in question arises under a private law contract.

Moreover, pursuant to Section 2(3) of the HAA as amended in 2012, disputes involving a right *in rem* connected to real estate that is located in Hungary, or its lease or tenancy, may only be referred to an arbitral institution having its seat in Hungary, and only provided

that all the parties to the contract underlying the right *in rem* or to the lease or tenancy agreement have their seats or permanent establishments in Hungary. In addition, the language of any arbitration procedure must be Hungarian.

The 2012 amendments to the HAA indicate the existence of a significant opposition to arbitration within the Hungarian legislature. While they only apply directly to a limited range of disputes, when combined with the limitations discussed above on the freedom of parties to select an arbitral institution, they make Hungary one of most problematic States in the EU with respect to the freedom of parties to use arbitration to ensure a fair and effective resolution of their disputes.

(iii) Setting Aside, Recognition and Enforcement of Arbitral Awards

Recognition and enforcement of foreign arbitral awards in Hungary is governed by the 1958 New York Convention. The recognition and enforcement of domestic arbitral awards may be refused only if the subject-matter of the dispute is not arbitrable under Hungarian law or the award is contrary to Hungarian public policy.

The grounds for setting aside an arbitral award under the HAA are identical to the grounds for refusal of the recognition and enforcement of foreign arbitral awards under the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).. While most of these provisions will only be enforced by a Court at the request of a party, the court may establish *ex officio* that the subject-matter of the dispute is not arbitrable under Hungarian law or that the award is contrary to Hungarian public policy.

The deadline for filing an action for setting aside an award is 60 days after receipt of the award. The court may not review the merits of the award. A violation by the arbitral tribunal of either procedural or substantive law can lead to the setting aside of the award only if it falls under any of the grounds for setting aside.

Leading Arbitral Institutions

1. Court of Arbitration attached to the Hungarian Chamber of Commerce and Industry (HCCI)

Visit: Logistics of the Study precluded a visit to the Court
Questionnaire: Responses included in Annex

2.2.15. Ireland

Overview

With the adoption of a new Arbitration Act in 2010, Ireland substantially modernised what had become recognised as a problematic legal regime for arbitration. The current Irish Arbitration Act is not only based upon the 2006 Model Law, but explicitly gives the Model Law force of law in Ireland, and requires that the Act be interpreted in accordance with any *travaux préparatoires* that provide evidence as to the meaning that the provisions of the Model Law were intended to have. Consequently, the 2010 Arbitration Act represents an attempt to “internationalise” the law applicable to both domestic and international arbitration in Ireland to a degree arguably beyond that of any other State in the European Union/Switzerland.

Nonetheless, while the adoption of the 2010 Arbitration Act indicates a strong embrace in Ireland of contemporary standards regarding the proper regulation of arbitration, arbitration remains a specialised practice in Ireland, although potentially an increasing one. For example, a much larger proportion of Irish respondents to the Survey of Arbitration Practitioners undertaken as part of this Study indicated that arbitration was not their

primary field of work than was the case with respondents Survey-wide, this result obtaining even amongst individuals directly invited to complete the Survey because of their recognised prominence in Irish arbitration practice.⁷¹ Similarly, Irish respondents on average reported arbitration constituting a lower proportion of their work than did on average respondents Survey-wide.

In addition, while there are individual Irish arbitration practitioners with international reputations, Irish respondents generally reported more domestic/regional arbitration practices than was the case with respondents Survey-wide. For example, Irish respondents on average reported domestic commercial arbitration constituting a slightly larger proportion of their work than did respondents Survey-wide. Similarly, Irish respondents on average reported international commercial arbitration constituting a smaller proportion of their arbitration work than did on average respondents Survey-wide. In turn, Irish respondents who practice as arbitrators reported strongly regionalised practices, with only Ireland and England, Wales and Northern Ireland reported by more than one arbitrator as having served as the seat of an arbitration in which they served as arbitrator in the past five years. Moreover, even among these two States, Irish respondents who serve as arbitrator on average reported their practice including a lower proportion of arbitrations seated outside Ireland than did respondents Survey-wide with respect to their own States.

Nonetheless, while these results indicate that arbitration as a practice remains relatively underdeveloped in Ireland, there are clearly positive aspects to that practice. Irish respondents, for example, on average reported both the domestic and the international arbitrations in which they had been involved in the past five years concluding in periods equivalent to those reported on average by respondents Survey-wide. Moreover, Irish respondents on average reported final awards in both the domestic and the international arbitrations in which they had been involved in the past five years being delivered in a shorter time after conclusion of the hearings than was reported on average by respondents Survey-wide.

The institutional context in which arbitration occurs in Ireland has similar positive features. As already noted, Ireland adopted a new national arbitration law in 2010, and Irish respondents described Irish law as substantially more supportive of arbitration than did respondents Survey-wide with respect to their own national laws. In addition, while Irish respondents described Irish courts as slightly less liberal when interpreting the scope and validity of arbitration agreements did respondents Survey-wide with respect to their own national courts, Irish respondents described Irish judges as having a higher understanding of arbitration and a more positive attitude towards arbitration than did respondents Survey-wide with respect to judges in their own States. Moreover, Irish respondents reported Irish courts enforcing foreign arbitral awards more quickly than did respondents Survey-wide with respect to courts in their own States, and domestic awards being enforced in approximately the same amount of time as reported by respondents Survey-wide with respect to courts in their own States.

As discussed in the Focus section of this chapter, Ireland's arbitration law prior to 2010 was considerably less supportive of arbitration than the current law, and in particular allowed substantial involvement of Irish courts in the arbitral process. In such a situation it is perhaps unsurprising that arbitration did not develop into a major field of legal practice. However, with the adoption of the 2010 Arbitration Act, evidence that international norms of arbitration practice are already being adhered to, and a clear embrace of arbitration by both Ireland's legal practitioners and Irish courts, it is likely that Ireland will quickly develop as a more prominent arbitral centre.

⁷¹ Details of the responses provided to the questions in the Survey, both by respondents Survey-wide and specifically by respondents who identified Ireland as their State, are included in an Annex to this Study.

Focus

(i) Limited court intervention in arbitration

In reflection of its foundation in the UNCITRAL Model Law on International Commercial Arbitration, the Irish Arbitration Act lays out a regime in which national courts should only intervene in arbitration proceedings to the extent that it is required for ensuring the effectiveness of the arbitration process.

The incorporation of this approach into the UNCITRAL Model Law was taken because many courts around the world had previously taken a very interventionist approach to arbitration, seeing their role as to ensure that parties were not precluded access to court, and that arbitrations were conducted in accordance with the same standards as used in national courts. This traditional view was exemplified in Ireland's previous arbitration law, the Irish Arbitration Acts of 1954-1998 (the 1954 Act), which empowered the courts in Ireland to hear appeals from the decisions of arbitral tribunals on such grounds as "error of law" and "misconduct" (Section 38 of the 1954 Act). These provisions were used to subject to court examination alleged serious irregularities in the arbitral process, including refusals by the arbitrators to determine the case, unequal treatment of the parties by the arbitrators, or the refusal of arbitrators to hear evidence pertinent to the dispute.⁷² While on their face these provisions were designed merely to ensure the fairness of any arbitrations that took place under the 1954-1998 Acts, they provided significant opportunities for parties to attempt to undermine the arbitral process.

In addition, judgments of the High Court with respect to arbitral proceedings could, under the 1954 Act, be further appealed to the Supreme Court of Ireland. This could contribute to significant delays, thereby undermining the speed that is one of arbitration's most attractive features. Pressure on the Supreme Court's list meant that a delay of 3-4 years before review was made of a High Court decision was not unusual. In one of the last such cases heard by the Supreme Court prior to the enactment of the current Irish Arbitration Act, the gap between the arbitration and the decision by the Supreme Court was approximately five years.⁷³

As already noted, under the current Irish Arbitration Act the involvement of the courts in the arbitral process is very limited. This includes the availability of recourse to the courts against arbitral awards. Firstly, the ability to use court appeal as a means of challenging an arbitral tribunal's decisions on points of law has been removed, with challenge possible only on the limited and predominantly procedural grounds incorporated into the UNCITRAL Model Law. Second, parties may request the intervention of the High Court only in limited situations, such as for orders of interim measures of protection, which may also be requested from an emergency arbitrator or arbitral tribunal. Finally, decisions of the High Court with respect to arbitration proceedings can no longer be appealed to the Supreme Court of Ireland.

The new conception of the interaction of arbitration and courts adopted by the 2010 Irish Arbitration Act is a significant improvement in Ireland's approach to arbitration, and brings Ireland in line with the approach adopted in the most important contemporary arbitral jurisdictions.

(ii) Breadth of Arbitrability in Ireland

The parties to an arbitration agreement are generally free to decide on the types of disputes they wish to be resolved by means of arbitration. National laws, however, may

⁷² *McCarthy v Keane* [2004] 3 I.R. 617.

⁷³ *Galway City Council v Samuel Kingston Construction Limited & Geoffrey Hawker* [2010] IESC 18

limit this freedom in order to ensure that certain matters, particularly those that raise considerations of general public interest, will be determined by national courts. In most jurisdictions around the world, however, these limitations are gradually being removed, and there are now relatively few legal disputes that cannot be arbitrated in the most important arbitration States.

Under the Irish Arbitration Act of 2010, all commercial disputes can be referred to arbitration, and in practice arbitration has already become common in the insurance context, for example. There remain, however, certain categories of disputes that cannot be arbitrated, including those relating to the remuneration or the terms or conditions of employment of individuals subject to statutory dispute resolution by the Labour Relations Commission and the Labour Court. In addition, arbitrations conducted by a property arbitrator appointed under the Property Values (Arbitration and Appeals) Act 1960 fall outside the scope of the Irish Arbitration Act. In the context of consumer law, pre-dispute arbitration clauses involving consumers and relating to claims not exceeding € 5,000 are not binding. Consumers are, however, free to submit their disputes to arbitration after such disputes arise.

The new Irish Arbitration Act attempts to maximise the arbitration of disputes within Ireland, while retaining control over a particularly number of particularly sensitive areas. Indeed, the Act explicitly permits courts to suspend proceedings at any time, including during trial, to allow the parties to consider whether to submit their dispute to arbitration (Section 32). This liberal approach to the arbitration of disputes creates an opportunity for substantial development of arbitration in Ireland.

(iii) Underdevelopment of arbitration practice in Ireland

While the 2010 Irish Arbitration Act adopts a very liberal and positive approach towards arbitration, the more restrictive approach that existed under the previous Act meant that arbitration never became common enough for a substantial body of specialised arbitration practitioners, whose work focuses exclusively or predominantly on arbitration, to develop in Ireland. By way of example, in the survey of arbitration practitioners undertaken for the present Study, only 19% of Irish respondents indicated that arbitration was their primary field of their work.⁷⁴ Moreover, 8 respondents had specifically been invited to take the survey because of recognition of their arbitration expertise in international guides, yet only 1 of these invitees listed arbitration as their primary field of work.

The underdevelopment of arbitration practice in Ireland is also indicated by the fact that there is no full-service arbitral institution currently located in Ireland that is actively engaged in regular administration of arbitrations. As has been noted in this Study, such institutions often play an important role in the development of arbitration as a field, and the lack of an institution of this type in Ireland will slow the development of a community of specialised and expert arbitration practitioners.

Leading Arbitral Institutions

1. Dublin International Arbitration Centre/Chartered Institute of Arbitrators – Irish Branch
Visit: Logistics of the Study precluded a visit to the Centre
Questionnaire: Combined responses not received
2. European Court of Arbitration – Irish Chapter
Visit: Logistics of the Study precluded a visit to the Court
Questionnaire: No responses received

2.2.16. Italy

Overview

Arbitration in Italy has developed in the context of a famously slow Italian court system, which has not only resulted in what anecdotal evidence indicates is a high rate of ad hoc arbitration, but has also to a significant degree prevented Italy becoming a major arbitral centre, despite the presence in Italy of a substantial body of highly regarded arbitration specialists.

Arguably in reflection of the well-known problems with the Italian court system, when Italian respondents to the Survey of Arbitration Practitioners undertaken as part of this Study were asked to estimate the proportion of domestic commercial contracts and international commercial contracts entered into in Italy in the past five years that included an arbitration agreement, they provided higher estimates with regard to both types of contract than did respondents Survey-wide with respect to their own States.⁷⁵ Estimates of this nature cannot, of course, serve as accurate guides to the actual number of arbitration agreements included in contracts in a State, but they provide important information on the experience of arbitration professionals regarding the degree to which arbitration has been incorporated into a State's business practices. Notably, however, while Italian respondents indicated that domestic commercial arbitration constitutes a higher proportion of their arbitration work than did respondents Survey-wide, they also indicated that international commercial arbitration constitutes a lower proportion of their arbitration work than did respondents Survey-wide, and an equivalent proportion of their work to that constituted by domestic commercial arbitration. Notably, this equivalence exists even though Italian respondents estimated that a substantially higher proportion of international commercial contracts entered into in Italy will include an arbitration agreement than will domestic commercial contracts.

With respect to the practice of arbitration in Italy, notable differences can also be seen in the responses given by Italian respondents with respect to international and to domestic arbitration. For example, Italian respondents on average reported international arbitrations as taking an equivalent amount of time to that reported by respondents Survey-wide, and final awards in international arbitrations being delivered within approximately the same period of time after conclusion of hearings as was reported by respondents Survey-wide. By comparison, however, Italian respondents on average reported domestic arbitrations taking more time than did respondents Survey-wide, and reported final awards in domestic arbitrations on average being delivered after a longer period of time than reported on average by respondents Survey-wide.

Even with respect to international arbitration, however, which appears to operate more effectively in Italy than does domestic arbitration, the Italian legal system can be problematic. Italian respondents, for example, while describing Italian law as Supportive of arbitration, nonetheless describe it as less supportive of arbitration than did respondents Survey-wide with respect to their own national arbitration laws. Similarly, while Italian respondents described the understanding of arbitration of Italian judges as Adequate, and the attitude towards arbitration of Italian judges as between Neutral and Positive, these results are both lower than the description given on average by respondents Survey-wide with respect to judges in their own States. In addition, Italian respondents also described court proceedings for the enforcement of both domestic and foreign arbitral awards on

⁷⁴ Out of 21 overall respondents based in Ireland, 4 reported that arbitration constituted their primary field of work.

⁷⁵ Details of the responses provided to the questions in the Survey, both by respondents Survey-wide and specifically by respondents who identified Italy as their State, are included in an Annex to this Study.

average taking longer in Italy than did respondents Survey-wide with respect to their own States.

Italy has produced a number of leading arbitration specialists and its community of international arbitration lawyers is highly regarded within the field. Moreover, its leading arbitral institution, the Chamber of Arbitration of Milan, is widely regarded as one of the leading arbitral institutions in Europe. Nonetheless, when asked to recommend five States as seats for an international arbitration, only 71.79% of Italian respondents recommended Italy, making it the fourth most preferred State even amongst Italian respondents. By comparison, among respondents Survey-wide only 5.96% of respondents recommended Italy, making Italy fifteenth out of the thirty States included in this Study.

While the slowness of Italian courts compared to the courts of the leading arbitral jurisdictions and the existence in Italian law of provisions that diverge significantly from contemporary standards regarding the regulation of arbitration are the best explanation for such results, further problems also appear to remain with the practice of arbitration domestically in Italy. This is important because negative experiences with domestic arbitration unavoidably impact the perception of arbitration generally, and consequently of international arbitration, including among Italian judges and legislators. As a result, reforming Italian arbitration law, while a desirable measure, is unlikely to resolve the difficulties faced by Italian arbitration, and alteration in domestic arbitration practice is also likely to be required if Italian arbitration is to reach the potential suggested by the quality of its leading practitioners.

Focus

(i) Duration of State court proceedings

Any interaction between arbitration, be it domestic or international, with Italian national courts may be problematic. This is not because of the quality of Italian judges, as local courts generally demonstrate an adequate knowledge of arbitration and a friendly attitude towards this mechanism of dispute resolution, but because of the duration of State court proceedings. Italy has indeed been the object of reproach by the European Union and by the European Court of Human Rights because of this problem, which may also affect parties submitting to arbitration. In particular, the intervention of Italian courts might be necessary both during the proceedings, when the arbitration needs support, or after the award has been issued, at setting aside or enforcement stage. The duration of State court proceedings may, in these contexts, frustrate the expectation of the parties to have their dispute settled in a swift fashion.

Parties can, to a certain extent, limit such drawbacks by appointing an administering institution. In this case, many of the support functions provided by national courts can be provided by the arbitral institution managing the proceedings, which will generally act more efficiently than a court because of its specialised expertise. Administered arbitration, however, cannot in itself fully solve the problem, because the function of State courts cannot be substituted at the enforcement stage, or in setting aside proceedings. Instituting a specialised judge for setting aside procedures would be highly beneficial, as it would avoid the involvement of Italian Courts of appeal, which are generally affected by an extremely conspicuous backlog. As for enforcement, the problem is not unique to arbitration and commentators have argued that it should be addressed more generally in the context of an organic reform of book III of the code of civil procedure.

(ii) The Prohibition against Arbitral Interim Relief

In the Italian system, arbitral interim relief is expressly forbidden by the Code of Civil Procedure: pursuant to Article 818, 'arbitrators cannot grant sequestrations or other

interim measures, unless otherwise provided by the law'. Article 669 quinquies provides that parties who entered an arbitration agreement must submit their application for interim relief to the national Court that would have been competent on the merits of the dispute, in the absence of the aforementioned agreement. Said provision applies both before and after the start of the arbitration proceedings.

The rationale of the provision is uncertain: according to some authors, the Italian Lawmaker considered arbitrators unfit to grant provisional measures, because the judgment on interim matters requires a certain degree of *imperium* or *auctoritas*, i.e. the exertion of a public, coercive power or a kind of public force which only national Courts can have.⁷⁶ According to this view, interim relief is an expression of the sovereign, exclusive jurisdictional power of the State. A similar, interconnected reason for the aforementioned prohibition is that interim relief requires a provisional, summary view on the dispute, which is considered incompatible with arbitration.

However, issuing an interim order does not seem to require any different power than the one arbitral tribunals use to resolve the merits of the dispute: although the enforcement of the measure might require a power which arbitrators cannot exercise directly, the provisional judgment does not seem to be structurally different from the final one. In other words, if arbitrators fulfil a jurisdictional role when they decide the case definitively with the award, there is in principle no reason to negate that they can also take a provisional view on the dispute, in order to issue an interim order, which is later to be replaced with the final award. Of course, in the absence of spontaneous compliance, it would be necessary to resort to a national Court to obtain the coercive enforcement of the interim measure, similarly to what happens with final awards; nonetheless, the aforementioned authoritative powers can only become necessary once the order has been issued, with no prejudice to the possibility of an arbitral interim relief.

In addition, the *imperium* theory and its radical negation of arbitral provisional powers are not entirely compatible with the current wording of Article 818, which, after the 2006 reform, specifies that arbitrators cannot grant interim measures 'unless otherwise provided by the law'. Considering that specific provisions of law can enable arbitrators to issue provisional orders, the Code of Civil Procedure contemplates, at least in theory, the possibility of an arbitral interim power, thus confuting the *imperium* theory. In fact, there is one case where the Italian system expressly empowers arbitrators to grant provisional measures: in company disputes, the tribunal has the power to suspend the deliberations of the general meeting.

Therefore, it must be concluded that Article 818 is not a consequence of the logical impossibility of arbitral interim relief in the Italian system, but represents a mere choice of legislative policy, which should now be reformed.

(iii) Set-off

Article 817 *bis* of the Italian Code of Civil Procedure grants the arbitrators the possibility to decide on set-off objections, irrespective of whether the set-off is related to or arises out of a matter that is covered by an arbitration agreement between the parties. When the claimant brings an action relating to substantive legal relationship that falls within the scope of application of the arbitration agreement, asking for the payment of a sum of money, the respondent can object that the payment is not due, because the claimant also owes a sum of money. Even if the claimant's debt towards the respondent refers to a legal

⁷⁶ Calamandrei (1943), at 406; Carnacini (1958), at 894; Marengo (1994), at 136; Punzi (2000), at 633. On the above theory and its confutation see also La China (1999), at 96. The connection between arbitration and jurisdictional coercive powers has been analysed by Fazzalari (1973), at 225.

relationship which is not covered by the arbitration agreement, the arbitral tribunal has jurisdiction to hear the case. This provision is innovative, as it preserves the arbitral tribunal's jurisdiction even beyond the original scope of application of the parties' agreement. However, the jurisdiction of the arbitral tribunal on set-off counterclaims is subject to an important limit. Whenever the objection relates to the obligation to pay a sum of money which is higher than the sum of money originally requested by the claimant, the arbitral tribunal can only decide on the objection within the limits of value of the original claim. If, for example, A files a request for arbitration against B, under the arbitration agreement X, asking for the payment of € 100,00, B can resist A's claim by alleging that A owes him or her € 120,00, in light of a different legal relationship between the parties not covered by X. The arbitral tribunal will only have jurisdiction on B's counterclaim within the limits of the sum of € 100,00: if both debts are due and payable, the award will therefore dismiss A's claim and subsequently reduce B's credit from € 120,00 to the remaining € 20,00. On the contrary, if B seeks to obtain the full sum of € 120,00, it will be necessary to resort to the competent State court, as the arbitral tribunal has no jurisdiction to adjudicate the case relating to the obligation in its entirety under Article 817 *bis*.

Leading Arbitral Institutions

1. ADR Centre

Visit: Logistics of the Study precluded a visit to the Centre

Questionnaire: No responses received

2. Chamber of Arbitration of Milan

Visit: 10 June, 2014

Questionnaire: Responses included in Annex

3. Italian Association for Arbitration

Visit: Logistics of the Study precluded a visit to the Association

Questionnaire: Responses included in Annex

4. Venice Chamber of Arbitration

Visit: 21 July, 2014

Questionnaire: Responses included in Annex

1. Chamber of Arbitration of Milan

The Chamber of Arbitration of Milan is without question the leading arbitral institution in Italy, both in terms of the number of arbitrations it administers, and in terms of its recognition within the field. It remains, nonetheless, a clearly regional institution, with 90% of the parties involved in arbitrations administered by the Chamber coming from Italy. Moreover, most parties come from northern Italy, with only about a third coming from central and southern Italy. The Chamber is nonetheless actively attempting to expand its activities, having established an office in Rome and developed a network involving arbitral institutions in North Africa, the Chamber's primary foreign market.

The development of the Chamber was conditioned by the realities of arbitration in Italy, which is characterised by a large number of small local arbitral institutions on the one hand, very few of whom are genuinely active in the administration of arbitrations, and a large number of *ad hoc* arbitrations on the other. Indeed, the Chamber was established and developed its approach to arbitration primarily as a response to the experience in Italy of *ad hoc* proceedings, which in many cases proved costly and time-consuming, as well as often being of questionable quality. Because of this background, the Chamber has adopted an approach to the administration of arbitrations that places the institution in the center of proceedings, providing active support and guidance to both parties and arbitrators. In this way the Chamber seeks to ensure that arbitrations conducted under its auspices are notably different from the *ad hoc* proceedings that are still common in Italy.

By way of example, a case manager from the Chamber will attend arbitration hearings, to take note, ensure the effective functioning of the proceedings, and provide the institution with feedback on the in-hearing work of arbitrators. The Chamber also makes available the hearing rooms on its premises, which can be used free of charge for any arbitration administered by the Chamber. Particularly distinctively, it also has on premises a sizeable arbitration library, thereby providing parties to an arbitration at the Chambers easy access to major arbitration resources. The Chamber also reviews arbitral awards if requested to do so by arbitrators.

While this highly “hands on” approach to administration of arbitrations was adopted as a means of making institutional arbitration appealing in a State with a long tradition of *ad hoc* arbitration, it also provides a useful option for parties unfamiliar with arbitration, as the active involvement of the institution, along with the resources that it makes available, can help to remove some of the uncertainty that parties unfamiliar with arbitration can feel about the likely quality of a non-court proceeding.

The Chamber appoints arbitrators in approximately one third of the arbitrations it administers. It does not maintain a formal list of arbitrators, but does have access to a database that is used to identify potential appointees. Final appointment is generally made by the Chambers’ Arbitral Council. The Chamber does consider the development of the field in its selection of arbitrators, and approximately one-fifth of the appointments made by the Chamber are of individuals under 40 (the traditional age used within the field to denote a “young” arbitrator). In addition, 28% of the arbitrators in arbitrations administered by the Chamber are women.

The Chamber of Arbitration of Milan has several agreements with other institutions, but by far the most prominent collaboration is the one with three other European bodies, informally known as the “Gang of Four”: Milan, the Vienna International Arbitral Centre, the Arbitration Institute of the Stockholm Chamber of Commerce and the German Institution of Arbitration (DIS). Originated by the Secretary-General of the Milan Chamber, the Gang of Four centres around annual meetings between the Secretary-generals of the four institutions, as a means of exchanging experiences and best practices. This meeting is then followed by a public “roadshow”, in which the institutions provide information on their respective services. One particularly notable feature of this event is that the institutions make no effort to present a “united front”, arguing for a particular means of addressing any given situation. Rather, each institution is free to emphasise the particular approach it has adopted, and to argue for its benefits.

While in terms of caseload the Chamber remains a clearly regional institution, it has achieved a substantial degree of recognition within the field, particularly because of its highly managed approach to the administration of arbitrations. It is, however, clear that while the Chamber has a broad base of expertise among its staff, both the Chamber’s vision and its recognition within the field are closely tied to its current Secretary-General. While in one respect this provides reason to be optimistic about the Chamber’s future development, as it is clear that its current administration is very effective, the centrality of a single individual in an institutional setting also creates the risk that the institution will be significantly less successful if that individual departs. The broad strength of the Chamber’s staff makes it unlikely that it would deteriorate without its current Secretary-General, but it remains to be seen if it would continue to expand. Such long-term considerations aside, however, the Chamber has developed into a leading alternative arbitral institution, providing a far more managed approach to the administration of arbitrations than is the norm within the field.

2. Venice Chamber of Arbitration

The Venice Chamber is a relatively young arbitral institution, having been established only in 1990. Despite its attractive location it still has a relatively modest caseload, having administered sixty-six arbitrations in the past five years. However, this appears to be primarily reflective of a combination of the Chamber's regional focus and the long tradition of *ad hoc* arbitration in Italy, and the Chamber is very actively involved in the promotion of arbitration and arbitration education.

The Chamber was originally founded by the Venice Chamber of Commerce and its Membership includes a large number of local trade and professional organisations. This close integration into the local business community influences the Chamber's perception of its role as an arbitral institution, and the Chamber focuses on domestic arbitrations connected to the Veneto region, and more broadly the North-East of Italy. In addition, while the Chamber is actively engaged in attempts to expand its involvement in international arbitration, these efforts are focused on States of interest to Venetian businesses, in particular those in Eastern Europe and the Middle East.

Notably, however, this regionalised focus is a deliberate choice of the institution, rather than one thrust upon it by market realities, as the Chamber describes itself as playing a particular role within a larger range of arbitral institutions. That is, while the Chamber is certainly open to accept any level of dispute, it believes there are benefits to be gained from the availability to parties of a diversity of arbitral institutions. Disputes between two parties from the North-East of Italy, for example, may benefit from the localised knowledge of the Chamber, particularly when selection of an arbitrator is required. Similarly, an international arbitration involving a foreign party may yield the same benefits. In turn, Venice may be able to serve as a neutral institution for a dispute involving a party from Milan, the location of the Milan Chamber of Commerce, the dominant Italian arbitral institution.

The Chamber does maintain a list of arbitrators, however it is open for anyone to join who meets the stated minimum requirements in terms of professional skills and ethical standards. While the Chamber does not formally invite individuals to join the list, it will do so informally when a suitable candidate is identified. The Chamber is not bound by the list when it is required to make an appointment, however the list serves as its primary source for appointments, with arbitrators not on the list only being appointed where no member of the list is appropriate.

The Chamber does not practice as "hands on" an approach to arbitration as Milan, and realistically is precluded from doing so by its more limited resources and smaller number of staff. However, its approach to arbitration has similarly been informed by Italy's history of *ad hoc* arbitration, and by the length of proceedings in Italian courts. The Chamber is, for example, routinely engaged in the appointment of arbitrators in the proceedings it administers, and argues that its experience and its knowledge of the local arbitral community are more likely to achieve a suitable appointment than will be achieved by parties acting independently in an *ad hoc* arbitration. Similarly, the Chamber emphasises the ability of arbitration to resolve disputes more quickly than Italian courts, and argues that arbitrators are more likely to act quickly in an administered proceeding than in an *ad hoc* proceeding, as they will be aware that poor performance may affect future institutional appointments.

The Venice Chamber is a good example of a focused regionalised arbitral institution. The level of its connections to the local business community may risk its efforts to expand internationally, as foreign parties may see the Chamber as too closely attached to the Venetian counterparties most likely to suggest its use. However, it has a clear conception of

its role as a regional institution, as well as an interesting conception of a more collaborative network of arbitral institutions than currently exists, both in Italy and internationally. While it is far from clear that this collaborative multi-level approach is likely to be endorsed by many competing institutions in the near future, it is an appealing means of ensuring that the different constituencies that are now increasingly becoming involved in arbitration will have available an institution well suited for their particular disputes.

2.2.17. Latvia

Overview

Arbitration in Latvia is currently in a highly problematic state, undermined largely by poorly designed laws that have created a situation in which arbitration has come to be seen as often merely a means of avoiding the law, rather than an independent mechanism for resolving disputes in accordance with it. The most problematic aspects of Latvia's national arbitration law are discussed in both the Focus section included in this chapter, and the summary of Latvian arbitration law included in an Annex to this Study, however it can be noted here that the current state of arbitration in Latvia is so poor that when Latvian respondents to the Survey of Arbitration Practitioners undertaken as part of this Study were asked to nominate five States they would recommend as the seat for an international arbitration, not a single Latvian respondent recommended Latvia.⁷⁷

As already noted, the primary source of the current difficulties of arbitration in Latvia is the laws applicable to arbitration in Latvia. Indeed, Latvian respondents not only described Latvia's laws as less supportive of arbitration than did respondents Survey-wide with respect to their own national arbitration laws, but Latvian law received the lowest rating, with respect to its supportiveness of arbitration, given to the national law of any State included in this study, alongside Slovakia.

In addition, although to some extent perhaps in reflection of the problems created by the weaknesses in current Latvian arbitration law, Latvian respondents also described Latvian courts as being less supportive of arbitration than did respondents Survey-wide with respect to their own national courts. Latvian courts were, for example, described by Latvian respondents as more strict regarding both the validity and the scope of arbitration agreements than was reported on average by respondents Survey-wide with respect to their own national courts. Similarly, Latvian respondents described Latvian judges as having both a lower level of understanding of arbitration and a more negative attitude towards arbitration than did respondents Survey-wide with respect to judges in their own national courts.

However, while the institutional structure in which Latvian arbitration is operating is clearly highly problematic, it should be emphasised that there is evidence that, at its best, Latvian arbitration as a practice has notable strengths. For example, when respondents to the Survey were asked to compare the cost of arbitrating a dispute in their State compared with litigating the same dispute in the courts of their State, respondents Survey-wide on average described arbitration as between Neutral and Slightly More Expensive than litigation. Latvian respondents, however, described the cost of arbitration as Neutral compared to the cost of litigation.

Similarly when respondents were asked to compare the speed of arbitrating a dispute in their State with the speed of litigating the same dispute in the courts of their State, respondents Survey-wide on average described arbitration as Slightly Faster than litigation,

⁷⁷ Details of the responses provided to the questions in the Survey, both by respondents Survey-wide and specifically by respondents who identified Latvia as their State, are included in an Annex to this Study.

while Latvian respondents described arbitration in Latvia as Much Faster than litigation in Latvian courts. Moreover, there is reason to believe that this differential in speed is not entirely attributable to features of Latvian litigation, and instead reflects genuine speed in the conduct of arbitration in Latvia. Latvian respondents, that is, on average reported both the domestic and the international arbitrations in which they had participated in the past five years as concluding in less time than did respondents Survey-wide. In addition, Latvian respondents reported the final awards in both the domestic and the international arbitrations in which they had participated in the past five years as being delivered sooner after the end of hearings than did respondents Survey-wide.

Respondents to the Survey are likely to be at the more professional end of arbitration practice in Latvia, so given the known problems with arbitration in Latvia these results cannot be taken as indicative of all arbitration in Latvia. However, they do suggest that when leading Latvian arbitration practitioners are involved, arbitration in Latvia can indeed be “fast and cheap”, as business people around Europe often hope it will be.

These attractive features of arbitration in Latvia being recognised, it is nonetheless clear that the broader picture of Latvian arbitration has impacted on even the more professional element of Latvian arbitration, as indications are that arbitration remains a minority field in Latvia. For example, a higher proportion of Latvian respondents reported that arbitration was not their primary field of practice than was the case with respondents Survey-wide. Similarly, Latvian respondents on average reported arbitration constituting a lower proportion of their total work than did respondents Survey-wide.

The practices of Latvian respondents were also reported to be more highly national/regional than was this case with respondents Survey-wide. Latvian respondents, for example, reported domestic commercial arbitration constituting a higher proportion of their arbitration work, and international commercial arbitration a lower proportion, than was reported by respondents Survey-wide. Similarly, Latvian respondents who serve as arbitrators reported spending a lower proportion of their work time as arbitrators than was reported by respondents Survey-wide who serve as arbitrators. They also reported a lower proportion of their appointments being in arbitrations seated abroad, and no Latvian respondent reported being appointed as arbitrator in an arbitration with its seat outside the regional grouping of Latvia, Sweden, Ukraine and Russia.

As already noted, however, there are reasons to be optimistic about the potential of arbitration in Latvia. Nonetheless, it is clear that substantial changes to Latvian law will be required for this potential to be realised. Some efforts of this type are currently underway, however given that Latvian respondents described Latvian legislators as having a Low understanding of arbitration, and between a Neutral and Negative view of arbitration, it is unclear how optimistic it is appropriate to be that the most desirable solutions to the current situation will be adopted.

Notably, although a new Arbitration Law is in the process of being adopted, reported lobbying by Latvia's many arbitral institutions resulted in the rejection of attempts to base the new Law on the UNCITRAL Model Law. Consequently, while it is a positive sign that Latvian legislators recognise that Latvia's current arbitration law is problematic, it does not appear that they have been willing to adopt the changes required to allow arbitration in Latvia to reach its full potential.

Focus

(i) Increasing number of arbitral institutions

Under Article 486 of the Latvian Civil Procedure Law, which came into force on March 1st, 1999 (the Latvian CPL), permanent arbitral institutions operating in Latvia must be

registered with the Register of Companies of the Ministry of Justice. In March 2014 there were 214 permanent arbitral institutions registered in Latvia.⁷⁸

This abundance of arbitral institutions has arisen because although registration of institutions is obligatory, there exist no formal requirements regarding the establishment of an arbitral institution. As a result, in practice any legal entity can set up its own permanent arbitral institution, and there is a significant incentive to do so.

The unregulated nature of arbitration institutions in Latvia has created significant problems in the past for the perceived legitimacy of arbitration in Latvia, as some permanent arbitral institutions have been established as a means of supporting illegal activities through the creation of enforceable arbitration awards. As a result, in 2004 the constitutionality of arbitration as a mechanism for resolving disputes was contested in the Latvian Constitutional Court. Ultimately, however, in its decision of January 17, 2005, the Court confirmed that the relevant provisions of the Latvian CPL obliging courts to refer parties to arbitration where a valid arbitration agreement existed were indeed consistent with the constitutional right to a fair trial.

A further consequence of the large number of arbitral institutions in Latvia is that two or more arbitral institutions can have very similar names. This can cause jurisdictional problems for parties attempting to submit their dispute to arbitration, as it allows arguments to be made regarding which institution was intended to administer the arbitration.⁷⁹

In a parallel development, the high number of arbitral institutions in Latvia significantly intensifies forum-shopping, as parties attempt to ensure that their arbitration is administered by the institution they perceive as most favourable to them. This situation has raised further questions about the neutrality and quality of institutional arbitration proceedings in Latvia, as well as aggravating issues relating to the independence and impartiality of institutional arbitration actors. The potential extent of this problem can be seen in a 2008 Supreme Court case, which addressed a situation in which not only was the claimant's lawyer also a founder of the arbitral institution that was administering the proceedings, but the lawyer's office shared an address with the headquarters of the arbitral institution.⁸⁰

This problem has certainly not gone unrecognised by Latvia courts, and in 2004 the Latvian Constitutional Court held that the organisation of an arbitration court, as well as any previous relationships between the parties and the arbitrators, may all serve as justifiable grounds for questioning the independence and impartiality of arbitrators, and the possible consequent refusal of the enforcement of an arbitral award.⁸¹

Nonetheless, problems have persisted to such a degree that in January 2013 Article 497 of the Latvian CPL was amended to add new requirements regarding the qualifications of arbitrators. These include: good reputation, a law degree, at least three years of prior practical legal experience and no criminal record.⁸² Where a domestic arbitral award has been issued by an arbitrator who does not satisfy these requirements, enforcement of the award can be refused.

In addition, the Latvian Parliament is in the process of adopting a draft law on arbitration, discussions regarding which centered on the need to impose strict requirements for the

⁷⁸ The full list of all permanent arbitral institutions in Latvia is available (in Latvian) at: <http://www.ur.gov.lv/skireitijasas.html>.

⁷⁹ Kacevska, I. (2014)

⁸⁰ Supreme Court Decision in case No. SKC-179/2008, unpublished as discussed in: Kacevska, I. (2014).

⁸¹ Supreme Court Decision in case No. SKC-179/2008, unpublished as discussed in: Kacevska, I. (2014).

⁸² Kacevska, I. (2014)

incorporation of arbitral institutions, and to exercise increased public control over arbitrators.⁸³ It is currently unclear what provisions have been incorporated into Latvia's forthcoming new arbitration law, however while clearly some action is required to address the situation that has developed in Latvia, legislative control of this type must be exercised carefully if it is not to undermine the freedom and flexibility that is essential for arbitration to function properly.

(ii) No court assistance for arbitration tribunals in Latvia

Although Latvia adopted its current arbitration law in 1999, after the creation of the UNCITRAL Model Law on International Commercial Arbitration in 1985, that law was not modelled on the UNCITRAL Model Law. As a result, the Latvian CPL, which regulates arbitration in Latvia, provides for almost no court assistance for arbitral tribunals.

The only exception to this rule is contained in Articles 139 and 496 of the CPL, which allow a court to grant interim measures for the security of a claim if arbitration proceedings have not yet been commenced.⁸⁴ However, once arbitration proceedings are initiated neither a court nor an arbitral tribunal may issue any order granting interim relief. This is a significant weakness in Latvian arbitration law, and significantly undermines the appeal of arbitration in Latvia.

(iii) No setting aside procedure, and domestic *ad hoc* arbitral awards unenforceable

Arbitral awards in Latvia are not subject to a set-aside procedure, primarily out of concern that the introduction of such procedure would increase the caseload of the Latvian courts.⁸⁵

With respect to enforcement, there are slightly different legal provisions that regulate the enforcement of domestic and foreign awards in Latvia. Most notably, domestic *ad hoc* arbitration awards cannot be enforced in Latvia, which also contributed to the unpopularity of *ad hoc* arbitration in Latvia. This situation has resulted from the existence of a strong lobby of members of Latvian permanent arbitral institutions. By contrast, domestic arbitral awards that have been issued under the auspices of one of the permanent arbitral institutions in Latvia can be enforced under a procedure specified in the CPL.

As regards the recognition and enforcement of foreign arbitral awards, relevant provisions of Part 78 of the Latvian CPL, as well as the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards of 1958, should apply. As a result, there are no formal limitations on the enforcement of foreign *ad hoc* arbitral awards.

Leading Arbitral Institutions

1. Court of Arbitration of the Latvian Chamber of Commerce and Industry

Visit: Logistics of the Study precluded a visit to the Court

Questionnaire: No responses received

2.2.18. Lithuania

Overview

Arbitration is relatively new as an active form of dispute resolution in Lithuania, with Lithuania's first Arbitration Law only being adopted in 1996. Nonetheless, it is a growing

⁸³ The note on the proposed changes to Latvian arbitration law is available (in Latvian) on the Parliament's website at: <http://www.saeima.lv/lv/aktualitates/saeimas-zinas/21799-saeima-konceptuali-atbalsta-jaunu-tiesisko-regulejumu-skirejtiesam>.

⁸⁴ Kacevska, I. (2014).

⁸⁵ Ibid.

field, and one that appears to be finding acceptance within the Lithuanian business and legal communities.

Indications of the relative underdevelopment of arbitration in Lithuania can be seen in the fact that a larger proportion of Lithuanian respondents to the Survey of Arbitration Practitioners undertaken as part of this Study reported that arbitration was not their primary field of work than was the case with respondents Survey-wide.⁸⁶ Similarly, Lithuanian respondents reported that arbitration constituted a lower proportion of their work than was reported by respondents Survey-wide.

However, it is notable that while a smaller number of arbitration cases might suggest a more difficult field of practice to enter, Lithuanian respondents on average reported becoming involved in their first arbitration earlier in their careers than was the case with respondents Survey-wide. In comparison with the preceding results, this lends support to anecdotal reports that rates of arbitration in Lithuania are increasing, as it suggests that although there is still limited arbitration work available in Lithuania, there is more work than there are genuine arbitration specialists, thereby providing opportunities for junior lawyers to enter the field.

This same conclusion is arguably supported by the fact that Lithuanian respondents who work as arbitrators on average reported receive their first appointment as arbitrator sooner than did respondents Survey-wide who serve as arbitrators, suggesting again that there exist fewer respected arbitration specialists in Lithuania than there are arbitrator appointments, creating an opportunity for younger figures to enter into what is generally a field dominated by senior practitioners. This being said, however, it should also be acknowledged that Lithuanian respondents who serve as arbitrators on average reported spending a smaller proportion of their work as arbitrator than was reported on average by respondents Survey-wide. This suggests, that is, not that arbitrators in Lithuania are unable to take on new work, but that because arbitration is a relatively young and increasing field in Lithuania, there has not yet developed a solid “core” of arbitrators, and parties are more willing than is usually the case to appoint a younger and less experienced, but promising, individual.

Further indications of the state of growth of arbitration in Lithuania can arguably be seen in that when respondents to the Survey were asked to estimate the percentage of domestic commercial contracts and international commercial contracts entered into in their State in the past five years that included arbitration agreements, Lithuanian respondents estimated that a similar proportion of international commercial contracts contained arbitration agreements as did respondents Survey-wide with respect to their own States. In contrast, however, they estimated that a lower proportion of domestic commercial contracts in Lithuania contained arbitration agreements than did respondents Survey-wide with respect to their own States. Estimates of this nature cannot, of course, serve as accurate guides to the actual number of arbitration agreements included in contracts in a State, but they provide important information on the experience of arbitration professionals regarding the degree to which arbitration has been incorporated into a State’s business practices. Moreover, the pattern of a greater engagement with arbitration in international transactions than in domestic transactions is one that would be expected of a State in which arbitration was a new but growing form of dispute resolution. Arbitration, after all, provides particular benefits as a form of cross-border dispute resolution, and historically developed most strongly in that forum.

⁸⁶ Details of the responses provided to the questions in the Survey, both by respondents Survey-wide and specifically by respondents who identified Lithuania as their State, are included in an Annex to this Study.

In terms of practice, anecdotal reports indicate that arbitration in Lithuania often strongly emphasises speed, and indeed the rules of the Vilnius Court of Commercial Arbitration, the leading arbitral institution in Lithuania, require that the final award in arbitrations held under its auspices be delivered within six months of the case file being transferred to the arbitral tribunal. Similarly, Lithuanian respondents reported that both the domestic and the international arbitrations in which they have participated in the past five years were concluded more quickly than was reported by respondents Survey-wide, with domestic arbitrations on average being concluded within 4-6 months, and international arbitrations within 7-12 months. Moreover, in terms of expense, Lithuanian respondents on average described arbitrating a dispute in Lithuania as being no more expensive than litigating the same dispute in Lithuanian courts.

While rates of arbitration in Lithuania appear to remain relatively low, there is evidence that it is gradually gaining acceptance, and Lithuanian respondents described the attitude toward arbitration of Lithuanian business people, legislators and judges as between Neutral and Positive. Moreover, with the adoption of a new Arbitration Law in 2012, based on the UNCITRAL Model Law, Lithuanian respondents are also positive about the legal infrastructure in which Lithuanian arbitration occurs, describing Lithuania's laws as between Supportive and Very Supportive of arbitration.

There remain, of course, some unresolved issues, as is to be expected in a jurisdiction in which arbitration is still a growing field, and these are addressed in the Focus section of this Chapter and in the discussion of Lithuanian arbitration law included in an Annex to this Study. However, it is notable that when asked to recommend five States as the seat of an international arbitration, 85.00% of Lithuanian respondents recommended Lithuania, making it, alongside Sweden and England, the most preferred seat among Lithuanian respondents. The indications are that Lithuanian respondents have reason to be optimistic, and Lithuania has a promising future as an arbitral jurisdiction.

Focus

(i) Arbitrability of disputes related to public procurement

The Supreme Court of Lithuania in *UAB Kauno vandenys v WTE Wassertechnik* established a general rule that disputes arising out of the increase of the price of public procurement contracts (i.e. after the public procurement procedures have ended) are not arbitrable under Lithuanian law.⁸⁷ Rather, the execution of a public procurement contract is bound by mandatory provisions of the public procurement laws. The case was decided in 2011, hence under the previous version of the Lithuanian Law on Commercial Arbitration (the Law on Commercial Arbitration), no. I-1274 of 2 April 1996. Moreover, one of the purposes of the new Law was to reduce the number of disputes that are not arbitrable under Lithuanian law. However, while this suggests that Lithuanian courts will be more receptive to arguments that public procurement disputes are arbitrable, the case remains valid under the current Law on Commercial Arbitration.

The decision of the Supreme Court in *UAB Kauno vandenys v WTE Wassertechnik* is controversial for three reasons. First, it suggests that disputes related to the essential alteration of public procurement contracts should not be subject to arbitration, even if such disputes arise after the completion of public procurement procedures. Second, it holds that the provisions of the Law on Public Procurement should prevail over the provisions of the Law on Commercial Arbitration because of the *lex specialis* nature of the former. Third, the Court failed to analyse the possible commercial nature of public procurement contracts,

⁸⁷ The Supreme Court of Lithuania, *UAB Kauno vandenys v WTE Wassertechnik GmbH*, 3K-7-304/2011. The decision is available (in Lithuanian) at the following link:
<http://liteko.teismai.lt/viesasprendimupaiaska/tekstas.aspx?id=83ac1ed2-4cde-4692-afcc-b1758c432151>

which under previous caselaw could have allowed greater flexibility regarding their arbitrability. Specifically, in 2008 in civil case no. 3K-3-132/2008, the Court ruled that a public entity could be regarded as a commercial entity in a commercial relationship if it has entered into a contract for commercial purposes.⁸⁸ In the present context this would suggest that a public body could be held to an arbitration agreement to which it has agreed, precisely as would a commercial entity.

While not on its face an unreasonable interpretation of conflicting legislation, and only directly affecting the arbitrability of disputes related to the increase of the price included in a public contract, the interpretative approach adopted by the Supreme Court created the problem that it was no longer possible to determine whether a dispute was arbitrable merely by examining the 1996 Arbitration Law. Instead, it was necessary to be aware of any other pieces of legislation that might be applicable to the dispute, in order to ensure that this legislation did not itself include a reservation of jurisdiction to the courts. As a result, a lot of uncertainty was introduced to the enforceability of arbitration agreements.

Although this case was decided under the 1996 Arbitration Act, rather than the 2012 Arbitration Act, the introduction of the new Act has not completely resolved the issue. Public procurement disputes are still not included in the list of non-arbitrable disputes included in Article 12 of the 2012 Arbitration Act, however that article now begins with an express statement that “[a]ll disputes may be resolved in arbitration, except for cases stipulated in this article.” In addition, Article 3(11) of the 2012 Arbitration Act, defining the types of disputes covered by the Act, specifically lists “agreements concluded based on public procurement”.

A complication remains, however, arising from the fact that Article 3(11) refers to disputes arising from “agreements concluded” regarding public procurement. The impact of this phrase will be determined by how strictly it is interpreted by Lithuanian courts. Disputes regarding the procedures through which the contract was adopted, for example, might be held not to arise from the “concluded” agreement, since the dispute relates to matters before the agreement’s conclusion. Similarly, disputes relating to the amendment of such agreements, including increases in price such as addressed in *UAB Kauno vandenys*, might be held not to arise “out of” the “concluded” agreement, but rather involve a renegotiation of the agreement. In both cases, a court would then be free to conclude that the dispute remained non-arbitrable.

The arbitrability of public procurement disputes in Lithuania remains unclear, then, despite the adoption of the 2012 Arbitration Act. The language of the Act indicates that disputes not addressing the procedures leading to the adoption of the contract, and not characterisable as a renegotiation of the contract, will be arbitrable. However, as European Union law also does not regulate the question, the precise contours of the arbitrability of public procurement disputes in Lithuania will remain unclear until Lithuanian courts have addressed the issue under the 2012 Arbitration Act.

(ii) Insolvency and arbitration in Lithuania

Under the 1996 Law on Commercial Arbitration, disputes related to insolvency were not arbitrable. The 2012 Law on Commercial Arbitration, however, states that insolvency proceedings should not prevent the resolution of disputes by means of arbitration, and should not have any effect on the validity of an arbitration agreement entered into prior to the commencement of insolvency proceedings, unless all solvent parties to the arbitration request to have their property claims against the insolvent party examined by the court.⁸⁹

⁸⁸ Daujotas and Audzevičius (2012), at 6.

⁸⁹ Article 49.4(7) of the new Law on Commercial Arbitration.

Additionally, Article 49.8 of the 2012 Law on Commercial Arbitration prevents a company involved in insolvency proceedings from entering new arbitration agreements. In cases in which the solvent parties to an arbitration agreement decide to proceed with arbitration additional obligations are imposed on the members of an arbitral tribunal, to facilitate the parallel operation of the arbitral proceedings and the insolvency proceedings.⁹⁰

The 2012 Law has made Lithuania's approach to the interaction of insolvency and arbitration compatible with that prevailing in most EU Member States, however several contentious aspects of the new Law have not been addressed in caselaw or legal practice yet. These include the position in arbitral proceedings of creditors who have not signed the arbitration agreement and the enforceability of an arbitration agreement when an insolvent company lacks funding to pay arbitration costs.

(iii) Enforcement of arbitral awards in Lithuania

Article 41 of the 2012 Law on Commercial Arbitration regulates the procedure for the enforcement of arbitral awards. This procedure is applicable to both domestic arbitral awards and recognized foreign arbitral awards.

Problems have arisen relating to a distinction provided for in the Lithuanian Code of Civil Procedure between two types of documents: "documents subject to enforcement", and "enforceable documents". Documents subject to enforcement may only be enforced upon issuance of an enforceable document by a court. The enforceable document must then be submitted directly to the bailiff for enforcement action against the debtor to be initiated.

Under Article 41(4) of the 2012 Law, however, arbitration awards constitute documents subject to enforcement. As a result, it is necessary to participate in court proceedings prior to the award being enforced, a requirement that can significantly delay enforcement. This requirement is unlikely to be problematic for a foreign arbitral award, which must in any case be recognised by a Lithuanian court prior to enforcement.

It should, however, be noted that this situation has not created serious practical problems, and Lithuanian bailiffs are often willing to start enforcement action based on just an arbitral award. Nonetheless, the law as it stands unnecessarily complicates and can delay the enforcement of arbitral awards delivered in Lithuania. The issue is, however, currently under review, and is expected to be resolved through amendments to the current law.

Leading Arbitral Institutions

1. Vilnius Court of Commercial Arbitration (VCCA)

Visit: Logistics of the Study precluded a visit to the Court

Questionnaire: Responses included in Annex

2.2.19. Luxembourg

Overview

Despite Luxembourg's reputation as one of the most business-friendly jurisdictions in Europe, and its role as the seat of a number of subsidiaries of foreign corporations, it has yet to develop a significant presence within arbitration. Indeed, 87.50% of Luxembourg respondents to the Survey of Arbitration Practitioners undertaken as part of this Study reported that arbitration was not their primary field of work.⁹¹ Similarly, Luxembourg

⁹⁰ Article 49.9 of the new Law on Commercial Arbitration.

⁹¹ Details of the responses provided to the questions in the Survey, both by respondents Survey-wide and specifically by respondents who identified Luxembourg as their State, are included in an Annex to this Study.

respondents reported that arbitration constituted a smaller proportion of their work than did respondents Survey-wide. Moreover, Luxembourg respondents reported spending longer in their practice before becoming involved in their first arbitration than did respondents Survey-wide.

While these results indicate that arbitration has not yet become a significant field of practice within Luxembourg, answers provided by Luxembourg respondents also suggest that this results from a lack of real embrace of arbitration within Luxembourg. Luxembourg respondents, for example, while reporting on average that international arbitration constituted an equivalent proportion of their arbitration work as did respondents Survey-wide, reported that domestic arbitration constituted a smaller proportion of their arbitration work than did respondents Survey-wide. Similarly, when asked to estimate the proportion of domestic commercial contracts and international commercial contracts entered into in their State in the past five years that contain an arbitration agreement, Luxembourg respondents provided lower estimates in both cases than did respondents Survey-wide. Estimates of this nature cannot, of course, serve as accurate guides to the actual number of arbitration agreements included in contracts in a State, but they provide important information on the experience of arbitration professionals regarding the degree to which arbitration has been incorporated into a State's business practices.

One possible explanation for this apparent lack of embrace of arbitration within Luxembourg can perhaps be found in a perception that arbitration in Luxembourg is expensive. Arbitration is, of course, often regarded as more expensive than court litigation, however when respondents to the Survey were asked to compare the cost of arbitrating a dispute in their State versus litigating the same dispute in the courts of their State, while respondents Survey-wide viewed described arbitration as between Neutral and Slightly More Expensive than litigation, Luxembourg respondents described arbitration in Luxembourg as between Slightly More Expensive and Much More Expensive than litigation in Luxembourg courts. Similarly, when asked to evaluate the importance of certain features of a transaction with respect to whether they would recommend inclusion of an arbitration agreement in a contract, Luxembourg respondents regarded the small financial value of a contract to be a Strong Reason to Avoid Arbitration, a substantially more negative response than that given by respondents Survey-wide.

There are, however, additional obstacles that appear to be faced by arbitration in Luxembourg beyond a perceived high cost, as the institutional structure within which arbitration operates in Luxembourg is less favourable than that in the more prominent arbitral States. For example, as noted in the discussion of Luxembourg law included in an Annex to this Study, Luxembourg courts have in several cases adopted strict approaches to the interpretation of arbitration agreements, including with respect to both the separability of arbitration agreements from contracts within which they are contained, and the bindingness of time limits included within arbitration agreements. Similarly, Luxembourg respondents on average described Luxembourg courts as less liberal when interpreting the scope of arbitration agreements than did respondents Survey-wide with respect to the courts of their own State. Luxembourg respondents also described Luxembourg judges as having both a lower understanding of arbitration and a less positive attitude towards arbitration did respondents Survey-wide with respect to judges in their own States. Notably, the law that judges in Luxembourg are interpreting is not based on the UNCITRAL Model Law, and is described by Luxembourg respondents as less supportive of arbitration than was the case with respondents Survey-wide with respect to their own national laws.

It is, however, important not to overstate these results, as although in many cases Luxembourg was described by Luxembourg respondents as less favourable for arbitration than respondents Survey-wide described their own States as being, when Luxembourg

respondents were asked to recommend five jurisdictions as the seat for an international arbitration, 100% of Luxembourg respondents included Luxembourg as one of their five most preferred seats. Indeed, while arbitration remains relatively underdeveloped in Luxembourg, and the institutional structure within which arbitration occurs in Luxembourg is less favourable to arbitration than that found in some other European jurisdictions, Luxembourg practitioners did not describe the above aspects of arbitration in Luxembourg in genuinely negative terms.

It is unclear whether there are likely to be significant changes to Luxembourg's arbitration laws in the near future, as Luxembourg respondents described Luxembourg legislators as having only a Neutral attitude to arbitration. In addition, the weakness of Luxembourg's only arbitral institution, as discussed in the Focus section of this chapter, undoubtedly contributes to the underdevelopment of arbitration in Luxembourg, as arbitral institutions often play a central role in the development in both practitioners and judges of both an understanding of and a positive attitude towards arbitration. Were such weaknesses fixed, however, arbitration in Luxembourg likely has a positive future.

Focus

(i) Confidentiality of arbitration in Luxembourg

Luxembourg amended its arbitration law in 1998 and now the main provisions on arbitration are contained in Articles 1224 to 1251 of the New Code of Civil Procedure (NCCP), Second Part, Book III. However, the 1998 amendment did not encompass significant changes to the preceding law, meaning that in reality Luxembourg's current arbitration law is still largely based on the Grand Ducal Decree of 8 December 1981 (the Grand Ducal Decree).⁹²

This historical background is important for understanding the approach to the confidentiality of arbitration that currently exists in Luxembourg, as it was adopted against a background of serious concerns regarding the ability of parties to keep confidential the details of disputes submitted to arbitration. Specifically, under the law as it existed prior to the Grand Ducal Decree of 1981, in order to facilitate appeal against arbitral awards, arbitrators were obligated to submit all arbitral awards to the courts within three days of their being rendered. This requirement raised significant concerns regarding the ultimate confidentiality of such awards, and the details they contained of the parties and their dispute.⁹³

With the adoption of the Grand Ducal Decree, appeal against arbitral awards was abolished, as was the mandatory depositing of arbitral awards with the courts. Deposit of an award with the courts is still required if the award is to be enforced, but where the award will be complied with voluntarily by the parties it is now possible to keep the details of the award confidential. In addition, the records of the courts themselves are not published.

More notably, while Luxembourg law does not impose a confidentiality obligation on parties or their representatives, arbitrators are obligated by Luxembourg's criminal law to keep all facts that have been revealed in the arbitration proceedings confidential unless they are required to disclose business secrets by the courts or the law.⁹⁴ Failure to comply with this obligation subjects arbitrators to the risk of eight days to six months imprisonment and a fine of between € 500 and € 5,000 (Article 458 of the Luxembourgish Penal Code).

⁹² Harles, G. (2011).

⁹³ Ibid.

⁹⁴ Harles, G. (2011).

(ii) Difficulties regarding institutional arbitration in Luxembourg

In 1987, following the adoption of the Grand Ducal Decree in 1981, the Chamber of Commerce of the Grand Duchy of Luxembourg created its own Arbitration Centre. The Centre operates under the supervision of an Arbitration Council, composed of five members: (1) the president of the Luxembourg National Committee of the International Chamber of Commerce (the ICC), acting as a chairman; (2) the Luxembourg member of the International Arbitration Court of the ICC; (3) the President of the Bar of Luxembourg; (4) the director general of the Luxembourg Chamber of Commerce; and (5) the President of the Institute of Auditors.⁹⁵

In further reflection of the links between the Arbitration Centre and the ICC, while the Centre has adopted its own Arbitration Rules, these rules largely mimic the Arbitration Rules of the ICC. These rules do not, however, contain provisions regulating certain fundamental elements of the administration of arbitration proceedings, including the organization of the Secretariat that is charged with administration of cases, and rules on the costs of arbitration proceedings. In contrast, most leading arbitral institutions have developed detailed procedures regarding the Secretariat and regarding communications between the parties and members of the Secretariat, together with the schedules of costs that allow parties to calculate the cost of arbitration proceedings even before a dispute arises.

In addition, while, as already noted, the Arbitration Centre has adopted its own Arbitration Rules, it also makes itself available to parties who wish to have their dispute resolved under the Arbitration Rules of the ICC. While in principle such a procedure increases party autonomy, by allowing parties to select the procedural rules they wish applied to their dispute, problems have arisen in other jurisdictions when one party decided to challenge the mandate of the chosen arbitral institution to administer the proceedings pursuant to the arbitration rules of a competing arbitral institution. This situation has recently been further complicated by the revised provisions contained in Articles 1(2) and 6(1) of the 2012 ICC Arbitration Rules. These provisions expressly state that the ICC Court of Arbitration is the only body authorised to administer arbitration cases under the ICC Rules, thereby implying that parties who refer to the ICC Arbitration Rules in their arbitration agreement have thereby agreed to have their arbitration administered solely by the ICC.

In 2013 the Singapore High Court, in *HKL Group Co Ltd v Rizq International Holdings Pte Ltd* [2013] SGHCR 5, upheld an arbitration clause authorising the Singapore International Arbitration Centre (SIAC) to administer an arbitration under the ICC Rules despite finding that such a clause was incompatible with the ICC Arbitration Rules (Lee, 2013). However, there is currently no caselaw within Luxembourg regarding the treatment of such a clause, and hence significant uncertainty remains.

The caseload of the Arbitration Centre remains modest and most arbitration proceedings in Luxembourg are conducted on an *ad hoc* arbitration basis. Combined with the degree to which the Arbitration Centre is reliant upon the ICC, both formally and informally, this apparent lack of confidence in the Centre by arbitration practitioners in Luxembourg indicates that significant further development of institutional arbitration in Luxembourg is required if Luxembourg is to develop into an important arbitral centre.

⁹⁵ Information provided on the website of the Chamber of Commerce of the Grand Duchy of Luxembourg at: <http://www.cc.lu/en/services/official-opinions-legislation/arbitration-centre/>.

(iii) Registration of arbitral awards and leave for enforcement

As mentioned above, with the adoption of the Grand Ducal Decree in 1981, the requirement for the parties to register all arbitral awards with the Luxembourgish courts was abolished. Nonetheless, where voluntary compliance with the award does not occur, the party seeking enforcement of the award is obligated to request a declaration of enforcement ("*exequatur*") of the domestic award by the President of the District Court. In such a case, deposit of the award with the court by the parties or arbitrators is still compulsory, although at this stage the award and the court's order authorizing (or refusing) enforcement are not publicly available. In addition, if the arbitration is conducted in accordance with the Arbitration Rules of the Arbitration Centre, arbitrators must deposit the original arbitral award with the secretariat of the Arbitration Council (Harles, 2011).

Court procedure for the enforcement of arbitral awards is straightforward, and for both domestic and foreign awards is regulated by the NCCP, or by the New York Convention of 1958 where it is applicable. In cases of foreign arbitral awards, the parties should submit the original or duly certified copies of the award and the arbitration agreement to the relevant District Court. The President of the District Court does not have the power to scrutinise the merits of arbitral awards, but conformity of awards with the rights of the parties, as well as with the requirements of Luxembourg international public policy must be verified (Court of Appeal, 28 January 1999, *Pas. Lux.* no. 31; Harles, 2011).

The court's decisions issued in the context of proceedings for the enforcement of arbitral awards can be published in "*Pasicrise Luxembourgeoise*," the official record of Luxembourgish jurisprudence (Harles, 2011).

Leading Arbitral Institutions

1. Centre d'Arbitrage de la Chambre de Commerce du Grand-Duché de Luxembourg
Visit: It was not possible to arrange a visit to the Centre
Questionnaire: No responses received

2.2.20. Malta

Overview

Arbitration in Malta has been given some distinctive features as a result of the embrace by the Maltese government of arbitration as a mechanism for the resolution of a range of smaller disputes that rarely go to arbitration in other European States. Specifically, under Maltese law a number of types of dispute, including those relating to condominiums, traffic accidents, and construction (excluding personal injuries) are subject to a form of mandatory arbitration. In addition, not only is the Malta Arbitration Centre, Malta's only arbitral institution, established in Malta's Arbitration Act, but the Act gives the Centre several powers more commonly exercised by national courts, including the power of the Registrar of the Centre to issue subpoenas to compel witnesses to give evidence or produce documents in a domestic arbitration.

This has unquestionably given arbitration a prominence within Malta, and the Malta Arbitration Centre reports an average caseload of approximately four hundred cases per year. However, approximately 95% of those cases involve a claim for €25,000 Euros or less and arise out of Malta's mandatory arbitration provisions. Consequently, while it is clear that arbitration is in one sense commonplace in Malta, it also appears to be the case that the type of arbitration that is most familiar in Malta is very different in nature from commercial arbitration.

Nonetheless, it does not follow that traditional commercial arbitration does not also occur in notable amounts in Malta, and although Maltese respondents to the Survey of Arbitration Practitioners undertaken as part of this Study reported that arbitration constituted a smaller proportion of their work than was reported on average by respondents Survey-wide, they also reported that domestic commercial arbitration constituted a greater proportion of their arbitration work than did respondents Survey-wide.⁹⁶ In addition, when asked to estimate the proportion of domestic commercial contracts entered into in Malta in the past five years that contained an arbitration agreement, Maltese respondents estimated a higher proportion than did respondents Survey-wide with respect to their own States. Estimates of this nature cannot, of course, serve as accurate guides to the actual number of arbitration agreements included in contracts in a State, but they provide important information on the experience of arbitration professionals regarding the degree to which arbitration has been incorporated into a State's business practices.

However, while there is reason to believe that the active embrace of arbitration by the Maltese government has encouraged an enhanced awareness of arbitration in Malta, this does not seem to have resulted in an increase in Malta's recognition within international arbitration. Indeed, while, as already noted, Maltese respondents reported higher rates of involvement in domestic commercial arbitration than was reported by respondents Survey-wide, they also reported much less involvement in international commercial arbitration than did respondents Survey-wide. In parallel, the leading international guides to arbitration practice, which were used as a means of identifying individuals to invite to take the Survey of Arbitration Practitioners, list relatively few individuals in Malta for their expertise in arbitration. This does not, of course, mean that expertise in arbitration in Malta is limited, and the relatively high levels of domestic arbitration would suggest such expertise does indeed exist. However, Maltese practitioners in general appear not to be involved in international arbitration regularly enough for the level of expertise they possess to be evaluated outside Malta.

The degree to which arbitration has been formally incorporated into the Maltese legal system potentially also explains one other notable feature of arbitration in Malta, namely the degree to which Maltese courts will sometimes intervene in the arbitral process. This topic is dealt with further in the Focus section of this chapter, but the problems such intervention may cause is also indicated in the description given by Maltese respondents of the approach taken by Maltese judges to the interpretation of both the validity and the scope of arbitration agreements. Whereas respondents Survey-wide described on average described judges in their own States as adopting an approach between Neutral and Liberal with respect to both validity and scope, Maltese respondents described Maltese judges as adopting an approach between Neutral and Strict.

It is not unlikely, that is, that the degree to which arbitration has been incorporated into the Maltese legal system has encouraged Maltese judges to view arbitration in precisely that way – that is, as an element of the Maltese legal system, rather than as a distinct and independent dispute resolution mechanism. Judges more familiar with arbitration will no doubt make a distinction between mandatory domestic arbitration and commercial arbitration, however where a judge's primary knowledge of arbitration comes from mandatory domestic arbitration, this is highly likely to influence his/her understanding of arbitration in general, and as a result influence the view he/she adopts of the proper relationship between arbitration and national courts.

Malta's embrace of arbitration as a mechanism for the resolution of even small value disputes is a notable feature of its legal landscape, and gives a distinctive tenor to

⁹⁶ Details of the responses provided to the questions in the Survey, both by respondents Survey-wide and specifically by respondents who identified Malta as their State, are included in an Annex to this Study.

arbitration in Malta. However, despite having had an international arbitration law based on the UNCITRAL Model Law since 1996, and thereby possessing the legal framework required to gain a significant place in international arbitration, Malta has not yet become a prominent seat for international arbitrations. Indeed, this is so even though there are clear indications of positive features to Maltese arbitral practice. For example, while respondents Survey-wide on average described arbitrating a dispute in their State as between Neutral and Slightly More Expensive than litigating the same dispute in the courts of their State, Maltese respondents actually described arbitrating a dispute in Malta as Slightly Cheaper than litigating the same dispute in Maltese courts. Similarly, when Maltese respondents were asked to evaluate certain features of a transaction with respect to any decision to include an arbitration clause in the related contract, they placed particular emphasis on the suitability of arbitration for disputes that were low in value.

There is reason, that is, to believe that arbitration in Malta aims at, and potentially achieves, an economically efficient process. In addition, Malta's prominent place in the international maritime shipping industry would seem to suggest Malta as a prominent centre for arbitration, particularly given the wide usage of arbitration within that industry. Moreover, when asked to recommend five States as the seat for an international arbitration, 80.00% of Maltese respondents recommended Malta, second only to England, Wales and Northern Ireland (100%). Consequently, while Malta's size makes it unlikely that it will ever be the home of a large international arbitration community, there are reasons to believe that it has the ability to expand further into international arbitration, particularly if international standards regarding the interaction between arbitration and courts were more clearly respected by Maltese courts.

Focus

(i) Constitutionality of mandatory arbitration in Malta

Arbitration in Malta is governed by the provisions of the Arbitration Act, Ch.387 of the Laws of Malta of 1996 (the Maltese Arbitration Act), as subsequently amended with the major changes implemented in 2004 by means of the Legal Notice 421 (the 2004 amendment).

The 2004 amendment introduced the concept of mandatory arbitration in respect of certain categories of disputes falling within the Fourth Schedule of the Maltese Arbitration Act. These disputes relate to motor vehicle incidents and certain disputes relating to the law of condominiums, among others. In situations in which such disputes arise parties are deemed to be bound by an arbitration agreement as a matter of law. As a result, the traditional requirement of party consent in arbitration is entirely eliminated.

The new legal framework for mandatory arbitration gave rise to a number of questions, including whether such a procedure is incompatible with the Maltese constitution. Unfortunately, the decisions by the Maltese Constitutional Court addressing this issue were seen as conflicting (e.g. the ruling of the Maltese Constitutional Court of 6 September 2010 in *Joseph Muscat v. Prime Minister, Minister of Justice and Attorney General*; the ruling of the Maltese Constitutional Court of 30 September 2011 in *H. Vassallo & Sons Limited v. Attorney General, Water Services Corporation and Enemalta Corporation*) and it was not until January 2013, in *Untours Insurance Agency Ltd and Emanuel Gauci v Victor et al*, that the Court attempted to clarify the issue.

The judgment in *Untours Insurance Agency Ltd and Emanuel Gauci v Victor et al* specifically addressed whether the appointment of arbitrators by the chairman of the Malta Arbitration Centre, in the absence of an arbitration agreement signed by the parties, infringed their right to a fair trial enshrined in Article 6 of the European Convention on Human Rights. The Court held that in the case under analysis the mandatory arbitration proceedings did not breach either the Constitution of Malta (Article 39(2)) or the right to a fair trial under

Article 6 of the European Convention on Human Rights, as the mere fact that the arbitrators were appointed by the chairman of the Malta Arbitration Centre did not raise justifiable doubts regarding the independence and impartiality of the arbitrators themselves.

Although the decision in *Untours* was focused on a specific issue, it required the Court also to decide on the constitutionality of mandatory arbitration, thereby resolving the issue under Maltese law.⁹⁷ It should be emphasised, however, that although mandatory arbitration may qualify as arbitration under Maltese law, the elimination of party consent to the proceedings means that it is highly doubtful whether an award issued as a result of a mandatory arbitration could be enforced abroad under either the New York Convention or many national laws.

(ii) Concurrent jurisdiction of courts and arbitral tribunals

An arbitration agreement is commonly recognised as a formal basis for the arbitration proceedings that triggers the jurisdiction of an arbitral tribunal. This means that whenever a dispute arises that falls within the scope of an arbitration agreement, any party to that agreement may initiate arbitration proceedings, thereby precluding other parties from bringing a court case on the same issue. Nonetheless, the fact that courts are able to bring to bear the power of the State, while arbitral tribunals cannot, means that even the most pro-arbitration State courts retain some level of involvement in the arbitral process.

In Malta, concurrent jurisdiction of state courts and arbitral tribunals is regulated by Article 15(3) of the Maltese Arbitration Act and Article 742 of the Code of Organisation and Civil Procedure (Chapter 12 of the Laws of Malta). Article 15(3) of the Maltese Arbitration Act expressly states that in cases in which parties have submitted their disputes to arbitration based on an arbitration agreement, and one party nevertheless initiates court proceedings, any party to such proceedings may at any time before delivering pleadings or undertaking other legal action apply to the court to stay the proceedings. The court should then issue an order staying the proceedings, unless it is satisfied that the arbitration agreement in question is inoperative or void.

These provisions of Maltese law mirror in substance those adopted in arbitration-friendly jurisdictions around the world. In practice, however, Maltese courts tend to interpret Article 15(3) of the Maltese Arbitration Act in a manner that actually endorses the overriding jurisdiction of the courts over arbitral tribunals, rather than respecting the independence of arbitration as a dispute resolution system.

This issue has been dealt with in a number of cases brought before the Maltese courts, with the courts in most cases continuing their proceedings even when they found that a valid agreement existed.⁹⁸ It has, for example, been held that where one party to an arbitration agreement did not respond to a letter from its counterparty, this constituted a failure to cooperate with the performance of the arbitration, and sufficed to authorise the complaining party to commence an action Maltese courts instead of an arbitral tribunal. Notably, this is in stark contrast to the dominant approach internationally, in which the complaining party would be permitted to commence arbitration without the participation of the unresponding party, with the resulting award binding the unresponding party, rather than commence court proceedings.

⁹⁷ The position of the Court in *Untours* upholding the validity of mandatory arbitration was further confirmed in *Gasam Mamo Insurance Limited v. Alexander Jan Edward Van Reeve et al* (decided on 5 November 2013) and in *Joseph M. Zrinzo et al v. Prime Minister et al* (decided on 11 February 2014).

⁹⁸ See e.g. Court of Appeal, 25 February 2003 in *Calibre Industries Ltd. v Muscat Motors*; Court of Appeal, 10 October 2003 in *Gatt Ignatius v. Facchetti Franco*; Court of Appeal, 9 November 2012, in *Malta Shipyards Limited v. VPJ Limited*.

This willingness of Maltese courts to intervene in the arbitral process is a significant impediment to the growth of arbitration in Malta, as well as being fundamentally inconsistent with respect for party autonomy, which requires enforcement of a valid agreement to resolve disputes through arbitration, rather than litigation.

(iii) Lack of joinder of third parties to arbitration proceedings

Pursuant to Article 961 of the Code of Organisation and Civil Procedure, it is possible for a defendant to request to join a third party to court proceedings without obtaining the consent of the plaintiff in those proceedings. By way of illustration, the joinder of a third party may occur in construction litigation when a contractor claims payment from her employer and another contractor (not a party to the litigation) also seeks damages from the same employer as a result of the same construction works. In arbitration, however, joinder would only be possible where there was not only also an arbitration agreement between the employer and the non-party contractor, but where the first contractor also agreed to the addition of the second contractor to the proceedings (Arbitration Rules, Malta Arbitration Centre, Legal Notice 421 of 2004, as subsequently amended). This constraint can be problematic because it is likely that the consent of the original claimant in the arbitration to the joinder of a third party will not be easily obtained, due to concerns over the impact of joinder on things such as the confidentiality of the proceedings and the expeditiousness of the arbitration.⁹⁹

Although the confidentiality that characterises arbitration means that it cannot be said with any certainty that this situation has caused significant practical difficulties in Malta, limitations on joinder in arbitration constitute a reason for Maltese parties to select litigation over arbitration. In light of the obstacles to the development of arbitration discussed above, this limitation may serve to further impede the development of arbitration in Malta.

Leading Arbitral Institutions

1. Malta Arbitration Centre

Visit: Logistics of the Study precluded a visit to the Centre

Questionnaire: Responses included in Annex

2.2.21. The Netherlands

Overview

Driven to an extent by the international recognition earned by individual Dutch arbitration specialists as either pioneers in the field or current leading figures in the field, the Netherlands has secured a solid place within contemporary international arbitration. Indeed, when respondents to the Survey of Arbitration Practitioners undertaken as part of this Study were asked to recommend five States as seats for an international arbitration, the Netherlands was recommended by 36.27% of respondents Survey-wide, making it the sixth most preferred State among the thirty States included in this Study.¹⁰⁰

One notable thing about this result is that the Netherlands has achieved this level of recognition while nonetheless having a national arbitration law that deviated in significant

⁹⁹ For the discussion on the legal regulation of the joinder in arbitration see: Strong (1998). Regarding the institutional arbitration rules providing for the joinder, see: Article 7 of the 2012 ICC Arbitration and ADR Rules, 22.1 (h) of the 1998 LCIA Arbitration Rules and Article 22.1 (viii) of the 2014 LCIA Arbitration Rules.

¹⁰⁰ Details of the responses provided to the questions in the Survey, both by respondents Survey-wide and specifically by respondents who identified the Netherlands as their State, are included in an Annex to this Study.

ways from the UNCITRAL Model Law, which serves as a guide to current views on the proper regulation of arbitration. Moreover, despite the differences between the Netherlands Arbitration Act and the UNCITRAL Model Law, Dutch respondents to the Survey on average described Dutch law as between Supportive and Very Supportive of arbitration. Moreover, while in 2015 a new arbitration law will come into effect, bringing Dutch law closer in substance to the UNCITRAL Model Law, that new law is still not merely an adoption of the Model Law, but reflects instead a selection of those aspects of the Model Law that it was believed would improve Dutch arbitration law. In short, the Dutch arbitration community is a very confident one, and the high regard in which the Netherlands is held as an arbitral seat indicates that its confidence is well-placed.

It should, nonetheless, be noted that this confidence also extends to Dutch courts, in ways that can be more controversial within the international arbitration community. Dutch respondents to the Survey generally described Dutch judges positively, stating that they had between an Adequate and a High understanding of arbitration, as well as a Positive attitude towards arbitration, both descriptions being equivalent to the description on average given by respondents Survey-wide with respect to judges in their own States.

More notably, however, Dutch respondents described Dutch judges as being less liberal in their interpretation of both the validity and the scope of arbitration agreements than was reported by respondents Survey-wide with respect to judges in their own States. Importantly, Dutch judges were merely described as adopting Neutral, rather than Liberal, interpretations, and not Strict interpretations. However, this neutral stance is consistent with anecdotal reports that, while not hostile towards arbitration at all, Dutch judges regard themselves as bearing ultimate responsibility for ensuring proper application of the law, and so do not feel the need to defer excessively to arbitration. A similarly independent-minded stance can be seen in the approach of Dutch judges on the Amsterdam Court of Appeals to the enforcement of arbitral awards set aside at the seat of the arbitration, as is discussed further in the Focus section of this chapter.

Nonetheless, despite the reputation that the Netherlands has gained as a seat of arbitrations, and the recognition with the field given to particular Dutch individuals, there are indications that Dutch arbitration practice remains a relatively regional one. For example, Dutch respondents who practice as arbitrators not only reported that serving as an arbitrator constituted a smaller proportion of their work than was reported by respondents Survey-wide who practise as arbitrators, but also reported sitting as arbitrator in a slightly smaller proportion of arbitrations seated abroad than did respondents Survey-wide who practice as arbitrators. In addition, arbitral appointments were strongly concentrated in the Netherlands, and only a single Dutch respondent reported having sat as an arbitrator in an arbitration seated outside the European Union/Switzerland in the past five years.

As already noted, the Netherlands has clearly developed a strong reputation within international arbitration, and is broadly regarded as a safe State in which to seat an arbitration. It has, however, not yet managed to move beyond its reputation as a seat, to establish an international reputation as a genuine leading centre for arbitration practice. However, the effectiveness with which it has established its reputation as an arbitral seat, while simultaneously refusing to conform strictly to the dominant international standards for the regulation of arbitration, suggests that at the top levels of arbitration practice in the Netherlands, the expertise required for top-level international practice is clearly there.

Focus

(i) New Dutch arbitration law adopted

Arbitration in the Netherlands is currently governed by the provisions of Book IV of the Dutch Code of Civil Procedure of 1985 (the “current Netherlands Arbitration Act”) that entered into force on 1st December, 1986, but a new Netherlands Arbitration Act was recently adopted and is expected to enter into force on 1st January, 2015 (the “revised Act”).¹⁰¹

The current Netherlands Arbitration Act is largely inspired by the UNCITRAL Model Law on International Commercial Arbitration of 1985 with amendments adopted in 2006, however it does deviate in some significant ways from the UNCITRAL Model Law. The primary goals of the revised Act are to further align Dutch arbitration law with the UNCITRAL Model Law, to reduce delays arising from state court proceedings, and to increase party autonomy in arbitration proceedings.¹⁰²

One important amendment to Dutch arbitration procedure that is being instituted by the new Arbitration Act requires that requests for setting aside arbitral awards should now be filed directly with a Court of Appeal, rather than with a District Court, as is currently the case. In addition, parties may exclude appeal to the Supreme Court in any arbitration not involving a consumer. As a result, parties can ensure that any award resulting from their arbitration is subjected to at most one level of court review.

In a similar measure, the new Act also simplifies the procedure for the enforcement of foreign arbitral awards, requiring that application for leave of enforcement should be made to the Court of Appeal (instead of the District Court), and that appeal to the Supreme Court is allowed only in situations in which the Court of Appeal rejects enforcement, not when enforcement is granted.

One particularly notable provision of the new Act allows the Court of Appeal, when addressing an action for annulment of an arbitration award, to suspend proceedings and remit the award back to the original arbitral tribunal, thereby allowing the tribunal to take any actions required to make the award enforceable. Traditionally, an arbitral tribunal is regarded as ceasing to exist as soon as it delivers its award to the parties, as at this point they have completed the role for which they were appointed.

This aspect of the new Netherlands Arbitration Act raises some issues regarding the existence of the arbitral tribunal after delivery of the award. As the court’s action occurs in the context of annulment proceedings, it is likely that in many cases one party to the arbitration will not wish the tribunal to reconvene and resolve the problem the court has identified. Consequently, the tribunal cannot reconvene under a new grant of power from the parties, as one party will not give its consent. The tribunal’s power to take any action, then, must be understood to be that granted for the original arbitration proceedings, and to have remained in effect until the conclusion of any annulment proceedings (as agreed by the parties when seating their arbitration in the Netherlands). This suggests, however, that the tribunal may also retain the power to revise its own award *sua sponte* during this period, a power that tribunals have traditionally been argued not to possess.

(ii) Deposit of arbitral awards with Dutch courts

The annulment procedure for domestic arbitral awards under the new Act remains similar to the provisions under the current Act, however one significant improvement concerns the abolition of the requirement that arbitral awards be deposited with the relevant District Court.

¹⁰¹ Strik, D. & Krestin M. (2014).

¹⁰² Van der Bend, B. & Nijburg, K. (2014).

Under the current Netherlands Arbitration Act an arbitral award must be deposited with the registry of the relevant District Court after it is rendered. This act both ends the arbitral tribunal's mandate and triggers the three-month period for annulment actions (the three-month deadline is also triggered by sending the arbitral award to the parties). This rule has been criticised as raising concerns over the confidentiality of arbitration in the Netherlands. Although the parties can ask the District Court to keep the award confidential, the Court may not be equipped with the necessary procedures to ensure that the confidentiality of the award will be maintained. Moreover, arbitrators who sit in *ad hoc* arbitral tribunals may be inexperienced in the technicalities of arbitration, and so be unaware of this requirement.

The provision under the new Act dealing with the deposit of domestic arbitral awards with the District Court addresses these concerns, as deposit is only required where agreed by all parties to the arbitration.

(iii) Granting leave for enforcement of foreign arbitral awards that were set aside abroad

The Amsterdam Court of Appeal has taken a unusual approach towards the question of whether arbitral awards that have been set aside by the courts of a foreign seat can be recognised and enforced in the Netherlands. Treatment of this issue varies enormously from State to State, with the courts of some States refusing to enforce such awards absent unusual circumstances, while those of other States regard foreign annulment as irrelevant to their own enforcement decision.

The Amsterdam Court of Appeal has twice ruled that it was in the position to closely scrutinize both the arbitration proceedings underlying the award and the merits of the award itself where the award was set aside in a State whose justice system is regarded as weak and/or biased.¹⁰³

This approach can be seen in the judgment of the Amsterdam Court of Appeal in *Yukos Capital v Rosneft*, in which the Court granted Yukos leave for enforcement although the arbitral award had been previously set aside in Russia.¹⁰⁴ The Court reasoned that although, in principle, courts in the Netherlands should recognise foreign setting-aside judgments, Dutch private international law authorised courts to refuse recognition of such judgments if they were issued in violation of due process.¹⁰⁵ In the judgment in question, the Amsterdam Court of Appeal held that it was likely that the Russian civil courts while making their decision to set aside the arbitral award against Yukos were not impartial, and therefore their judgment should be ignored.¹⁰⁶ This allowed the Amsterdam Court of Appeal to enforce the arbitral award in the Netherlands, despite it having been set aside in Russia.

Leading Arbitral Institutions

1. Netherlands Arbitration Institute

Visit: 4 August, 2014

Questionnaire: Responses included in Annex

2. Permanent Court of Arbitration

Visit: 4 August, 2014

Questionnaire: No responses received

¹⁰³ Ibid.

¹⁰⁴ 28 April 2009, case no. 200.005.269/01, LJN BI2451, JOR 2009/208, TvA 2010/5.

¹⁰⁵ Van der Bend, B. & Nijburg, K. (2014).

¹⁰⁶ Ibid.

1. Netherlands Arbitration Institute

The Netherlands Arbitration Institute (NAI) is an institution that has a distinctively regional approach to its work. While the NAI is not unusual in that overwhelmingly the arbitrations it administers include at least one local party, it is distinctive in that it expresses no desire to become a leading international institution, and is focused instead on effectively serving and supporting arbitration in the Netherlands and the surrounding region.

The NAI was founded by one of the Netherlands' most famous arbitration practitioners, Pieter Sanders, and has on its Advisory Board Albert Jan van den Berg, arguably the most famous current Dutch arbitrator. Unsurprisingly, then, the NAI is clearly actively involved in the Dutch arbitration community, including through the activities of the NAI Young Arbitration Practitioners (or "Young Orange"), a group established by the NAI for individuals under 40 who are interested in arbitration (40 being the standard age within the field for the designation "young"). In addition, the NAI has contacts with legislators and contributed to the recent amendment of the Dutch arbitration law, with its Managing Director and several members of the NAI Board serving on a related working group.

More surprising, however, is the NAI's self-conscious lack of international reach, which is particularly notable given the prominence of the Netherlands in the arbitration world. Indeed, in the survey of European arbitration practitioners undertaken as part of this study, 36.29% of respondents listed the Netherlands as one of their five preferred arbitral seats, making the Netherlands the sixth most preferred arbitral seat in Europe. Notably, only 4.42% of respondents to the survey were from the Netherlands, indicating strong recognition for the Netherlands internationally.

However, while 40% of the NAI's current caseload is constituted by international arbitrations, and it has agreements with some foreign arbitral institutions, the NAI remains focused exclusively on what might be called the Dutch regional market, with those international arbitrations arising from the participation by Dutch companies in cross-border transactions. Moreover, the NAI does not actively promote itself abroad, with the exception of Belgium, where a shared language creates a natural market for the NAI's services.

The NAI maintains a list of arbitrators. Although any professional under the age of 65 may apply to be added to the list, inclusion on the list ultimately depends on approval from the Board of the NAI. In addition, the NAI will proactively invite to join the list individuals who come to their attention but are not yet on the list. Importantly, although the NAI will begin with its list of arbitrators when it is required to appoint an arbitrator, it is not restricted to this list, and will appoint an arbitrator not on the list if necessary. This is an important qualification of the restriction that individuals are automatically removed from the list once they pass the age of 70. This does not mean such individuals cannot be appointed by the NAI, and particular individuals in this category may often be appointed. Such a blanket rule, however, avoids the need to address directly with ageing arbitrators concerns over the impact of their age on their performance.

As reflected by the establishment of Young Orange, the NAI is committed to developing arbitration as a field in the Netherlands, and actively attempts to appoint young arbitrators and female arbitrators where they are appropriate for a dispute. Currently, however, only 10% of arbitrators on the NAI's list are women.

The NAI abandoned its arbitrator challenge procedure in 2010, as that procedure allowed parties to appeal the NAI's decisions to the Dutch courts. Consequently, the Arbitration Rules of the NAI currently refer parties directly to the Dutch courts for any challenge procedure. The NAI is presently engaged in a revision of its Arbitration Rules, and while the contents of the new rules are as yet uncertain, it is likely that they will include a new

challenge mechanism, potentially requiring parties to bring a challenge either at the NAI or in Dutch courts, but not both.

Although the NAI was born as an institution for domestic arbitration it is becoming increasingly active in international arbitration, on the basis of incorporation of the NAI into arbitration agreements between Dutch parties and foreign parties. While the particularly strong relationship between the NAI and the Dutch arbitration community undoubtedly has a positive effect on the appeal of the institution amongst Dutch users, and the NAI's focus on the Netherlands and its surrounding region is by no means a negative feature, it could ultimately create obstacles in terms of international perception. In other words, non-Dutch parties may be likely to perceive the NAI as a "foreign", rather than "international" institution, whose appointment can be sometimes imposed by Dutch counterparts with strong bargaining power, but whose close connections with the Netherlands means that it is not, in principle, an optimal choice. For that reason, the relatively low international profile of the NAI, while consistent with its fundamentally regional institutional goals, might nonetheless frustrate its ability to serve local parties when they are operating on the international stage. Such concerns aside, however, the NAI is clearly an effective and active organization, that provides a significant benefit to arbitration in the Netherlands.

2. Permanent Court of Arbitration

Established in 1899, The Permanent Court of Arbitration (PCA) is unique as an arbitral institution, both in terms of its constitution and in terms of its operations. Functioning as an intergovernmental institution, the PCA has a membership of 115 States, each of which makes regular payments to sustain the PCA's operations. Currently, all twenty-eight EU Member States, Switzerland, and all EU candidate countries are PCA Members. Founded initially for the resolution of State-State disputes, in order to provide an alternative to war, the PCA now also administers arbitrations involving a State and a non-State entity, as well as playing a role in the appointment of arbitrators for *ad hoc* arbitrations held under the UNCITRAL Arbitration Rules. However, while the PCA has expanded its range of activities since its founding, its role in the resolution of disputes involving States remains central to its self-conception and its operations.

Currently only about 10% of the PCA's caseload consists of State-State arbitrations (eight arbitrations in total), although obviously such arbitrations often have a particular public prominence. With the rise of investment arbitration, however, the PCA began to offer its services to this market, as an institution uniquely experienced in the administration of arbitrations involving States, and the PCA currently administers approximately 57 arbitrations arising under bilateral or multilateral investment treaties, along with a further 30 arbitrations in which a State, State-controlled entity, or intergovernmental organisation is a party.

The PCA is located in the Peace Palace, in the Hague, Netherlands, but does not regard itself as in any substantive way a Dutch institution, and indeed enjoys jurisdictional immunities in the Netherlands. Rather, the PCA sees itself as a neutral body whose primary role is to facilitate the peaceful resolution of disputes involving States. The PCA has observer status in the United Nations General Assembly and in UNCITRAL Working Groups.

Administration of arbitrations at the PCA is undertaken by a combination of case managers and a legal counsel, with the case managers concentrating on secretarial tasks relating to the arbitration. Legal counsel assist the tribunal in a more substantial way, including attending hearings in order to ensure their correct logistic functioning. The PCA was unwilling to publicly discuss its internal procedures, and states that these vary greatly and are adapted to the needs of each case. However, it can be noted that the PCA's staff is

highly regarded within the arbitral community, both for the efficiency of its administration, and for the quality of its legal counsel.

Although the core area of activity of the PCA remains the administration of arbitration involving States, since the adoption of the UNCITRAL Arbitration Rules in 1976 the PCA has also performed a peripheral but important role in international commercial arbitration. The UNCITRAL Arbitration Rules are designed primarily for use in *ad hoc* arbitrations, in which the parties organise their own arbitral proceedings, without the involvement of an arbitral institution. One problem this approach creates is that if agreement is not reached on an arbitrator, or one party fails to appoint its arbitrator, no institution is available to make the appointment on the parties' behalf. National courts may perform this function, but as an alternative mechanism the UNCITRAL Rules delegate to the Secretary-General of the PCA the power to appointing an institution or individual (the "appointing authority") who will in turn appoint the arbitrator on the parties' behalf. In this way, it is hoped, the appointment will be made by an institution or individual with greater understanding of arbitration than is possessed by some courts. The PCA will also offer to parties its own services as appointing authority.

When selecting an appointing authority, the PCA does not use a consistent network of entities/individuals, but instead decides anew for each case. Once a potential authority is identified, they will be contacted and asked for a fee quotation. The PCA will decide if the fee is reasonable, without consultation with the parties, and if so will proceed. Appointing authority fees vary, but the PCA's own fee for serving as an appointing authority is 1500 Euros, and this likely serves as a guide regarding what the PCA regards as reasonable. The PCA charges 750 Euros to appoint the appointing authority for the parties.

As already mentioned, the PCA is a highly regarded institution, however questions can sometimes be raised about its suitability for every role that it performs. While it is clearly highly experienced at the administration of arbitrations involving States, for example, the deep connections of the PCA with States, and its reliance on the support of States for its activities, can be seen by non-States as making it less ideal as an administering institution for the resolution of disputes between States and non-States. States may insist on the PCA, as an institution with which they are comfortable, but just as a party may wish to avoid having its arbitration administered by an institution in its opponent's State, so non-States may be concerned about the highly State-centered context of the PCA. This does not reflect on the neutrality or competence of the PCA itself, but in any dispute resolution context perception is always important.

Potentially more problematic is the impact of the PCA's uniqueness within the arbitration field on its role in the selection of appointing authorities. There is no question that the PCA takes this role seriously, and attempts to identify an appropriate authority. However, the international focus of the PCA, combined with its particular focus on disputes involving States, means that the PCA is to a large degree isolated from the everyday world of non-elite commercial arbitration. The PCA can, of course, rely on the expertise of others, and does indeed often appoint a local arbitral institution as the appointing authority for commercial disputes. However, it is not clear in such cases that the interposition of the PCA between the parties and the appointing authority has provided much benefit. This again does not reflect a lack of good intent on the part of the PCA, but merely a practical reality involved in what is ultimately a relatively small organisation being expected to have intimate knowledge of arbitral communities in every part of the world. As a result, while the PCA serves an important role in the UNCITRAL Arbitration Rules as what might be called an "appointer of last resort", more sophisticated parties may ultimately be better served by taking advantage of the fact that the Rules also allow parties to identify for themselves the most appropriate appointing authority for their particular dispute.

2.2.22. Poland

Overview

While arbitration in Poland remains less developed than it is in the leading European arbitral States, Poland is both receiving growing international recognition for the quality of its arbitration professionals, and also has some claim to either being, or being likely to become, the leading arbitral jurisdiction in Eastern Europe.

At present arbitration remains a minority form of dispute resolution in Poland, and commentators acknowledge that despite dissatisfaction with Polish courts, litigation remains dominant. In reflection of this, Polish respondents to the Survey of Arbitration Practitioners undertaken as part of this Study on average reported spending a smaller proportion of their work on arbitration than did respondents Survey-wide.¹⁰⁷ Similarly, when asked to estimate the proportion of domestic commercial contracts and international commercial contracts entered into in Poland in the past five years that contained arbitration agreements, Polish respondents produced lower estimates with respect to both types of contract than were produced by respondents Survey-wide with respect to their own States. Estimates of this nature cannot, of course, serve as accurate guides to the actual number of arbitration agreements included in contracts in a State, but they provide important information on the experience of arbitration professionals regarding the degree to which arbitration has been incorporated into a State's business practices.

However, despite the relative lack of engagement within Poland with arbitration, there are indications that arbitration in Poland operates relatively efficiently. Polish respondents on average reported both the domestic arbitrations and the international arbitrations in which they have been involved in the past five years as concluding in comparable times to those reported by respondents Survey-wide. In addition, while Polish respondents described resolving a dispute through arbitration in Poland as Slightly More Expensive than litigating the same dispute in Polish courts, they also indicated that arbitrating a dispute in Poland is between Slightly Faster and Much Faster than litigating the same dispute in Polish courts. While the results just described are perhaps not remarkable, they nonetheless indicate an arbitration system operating, at least with respect to speed, in accordance with international standards, and providing a more efficient option than Polish courts for all but relatively small claims.

More significant problems, however, appear when the institutional context in which arbitration in Poland takes place is considered. For example, while Polish respondents did not describe Polish law in negative terms, they described it as less supportive of arbitration than did Survey-wide with respect to their own national laws. Indeed, although Poland's arbitration law is predominantly based on the UNCITRAL Model Law, it does deviate from that law in some significant respects, and these deviations have created some difficulties for arbitration in Poland. This situation is discussed in more detail in the Focus section of this chapter and in the description of Polish law included in an Annex to this Study.

In addition, Polish respondents described Polish courts as being less liberal with respect to both the validity and the scope of arbitration agreements than did respondents Survey-wide with respect to the courts in their own State. More broadly, Polish respondents described Polish judges as having an understanding of arbitration between Adequate and Low, and a Neutral attitude toward arbitration, both responses being less positive than were given on average by respondents Survey-wide with respect to judges in their own States. Similarly, while Polish respondents on average reported enforcement of domestic

¹⁰⁷ Details of the responses provided to the questions in the Survey, both by respondents Survey-wide and specifically by respondents who identified Poland as their State, are included in an Annex to this Study.

arbitral awards taking only 4-6 months, in line with periods reported by respondents Survey-wide with respect to their own States, Polish respondents on average reported enforcement of foreign awards taking 7-12 months, longer than reported on average by respondents Survey-wide with respect to their own States. Moreover, because Polish law allows enforcement decisions to be appealed all the way to the Polish Supreme Court, enforcement proceedings taking several years are not unknown.

It is arguably in recognition of these difficulties with both Polish law and Polish courts that when Polish respondents were asked to recommend five States as the seat of an arbitration, only 68.00% of Polish respondents recommended Poland. This is certainly much higher than the rate at which respondents in some States recommended their own State as a seat for an international arbitration, but nonetheless reveals significant misgivings among a number of Polish respondents about seating an international arbitration in Poland under current situations.

As mentioned initially, Polish arbitration practitioners are gradually gaining recognition at the international level. Nonetheless, Polish arbitration practice currently remains a predominantly domestic/regional one. Polish respondents, for example, on average reported that domestic commercial arbitration represented more of their arbitration work, and international commercial arbitration less of their arbitration work, than was reported by respondents Survey-wide. Similarly, Polish respondents who serve as arbitrators reported fewer appointments in arbitrations seated outside Poland than were reported on average by respondents Survey-wide with respect to their own States. It should, however, be noted, in reflection of the growing reputation of Polish arbitration professionals, that while foreign-seated appointments were overwhelmingly in arbitrations seated in Eastern Europe or Scandinavia, the most represented States after Poland itself were France and Switzerland, two of the major global seats for international arbitrations.

Poland, then, is a State with a growing reputation in arbitration, based primarily on the recognition being earned by Polish arbitration specialists. There remain significant problems with Polish arbitration law, and with the approach to arbitration of Polish courts, but if these problems can be addressed, there is reason to be optimistic that Poland may develop into a prominent arbitral State.

Focus

(i) Excessive duration of the proceedings for setting aside arbitral awards

Both domestic and international arbitrations having their seat in Poland are governed by the provisions of the Fifth Part of the Polish Code of Civil Procedure of November 17, 1964 (the 'Polish Arbitration Act') that entered into force in January 1965.¹⁰⁸ The Polish Arbitration Act was last amended on July 28, 2005 and the changes became effective as of October 17, 2005. The procedure it includes for setting aside arbitral awards is the only remedy against arbitral awards available to parties under the Polish Arbitration Act. In addition, parties may not agree to exclude the right to have a domestic or international arbitral award set aside in the courts.¹⁰⁹

Under the Polish Arbitration Act an application to set aside an arbitral award can be filed only with respect to an award that was made in Poland.¹¹⁰ Excluding circumstances in which the arbitral award was issued as a result of a criminal act, an action to set aside an award must be made within three months of the date the arbitral award was served to the parties. The grounds for setting aside arbitral awards are listed in Article 1206 of the Polish

¹⁰⁸ J.L. No. 40/1964 item 296 with subsequent amendments.

¹⁰⁹ Szpara, J. (2011) at 111.

¹¹⁰ Ibid. at 112.

Arbitration Act, and mirror the respective provisions of the UNCITRAL Model Law on International Commercial Arbitration of 1985 as amended in 2006 (the UNCITRAL Model Law).

The primary shortcoming of the proceedings for setting aside arbitral awards under the Polish Arbitration Act, then, concerns not the law regarding enforcement, but their length, as such proceedings may require participation in proceedings before up to three courts, with appeal available all the way to the Polish Supreme Court. In practice, this means that the process of setting aside arbitral awards may take several years.

The delays involved in setting aside proceedings mean that when a dispute is arbitrated in Poland, even if the arbitration itself is conducted speedily, significant delays will often occur before any resulting award can actually be enforced. This is a substantial impediment to arbitration in Poland, particularly as the delays in question cannot be mitigated to any extent by the agreement of the parties regarding the conduct of their arbitration.

(ii) Arbitrability, including arbitrability of corporate disputes

Although the 2005 amendments to the Polish Arbitration Act introduced a new provision regarding the arbitrability of disputes, this provision has given rise to a significant amount of confusion regarding the scope of disputes that can be submitted to arbitration. Under the previous regime, questions of arbitrability were addressed based on a distinction between financial and non-financial rights.¹¹¹ Since 2005, however, this distinction has been eliminated, and the Act now provides that parties may refer to arbitration both proprietary disputes and non-proprietary disputes, that they are legally permitted to settle before a State court, excluding claims for alimony (Article 1157 of the Polish Arbitration Act).

The complication that has arisen is that the language used in the Act has given rise to uncertainty whether the requirement that a dispute can be settled in the court by the parties refers only to non-proprietary disputes or to both: proprietary and non-proprietary disputes. On its face, then, the Act includes very broad provisions on arbitrability, similar to the UNCITRAL Model Law's inclusive standard that parties may submit to arbitration all disputes that have arisen or may arise between the parties in respect of a defined legal relationship, whether contractual or not. In practice, however, flawed draftsmanship has introduced a significant degree of uncertainty regarding which disputes may and may not be submitted to arbitration in Poland.

Similar confusion, indeed, exists with respect to the arbitrability of corporate disputes in Poland. Article 1163 of the Polish Arbitration Act states that parties may submit to arbitration disputes arising out of company relationships, if an arbitration agreement has been incorporated into the company's articles of association. This provision was initially interpreted by most arbitration practitioners as meaning that all corporate disputes could be referred to arbitration.¹¹² In 2009, however, the Polish Supreme Court held that the corporate disputes could be arbitrated only if they met the criteria enshrined in Article 1157 of the Act, regarding arbitrability (Resolution of 7 May 2009; III CZP 13/09). This means that corporate disputes can be arbitrated so long as the parties to the arbitration are legally permitted to settle their dispute before a State court. In the view of some commentators this implies a tacit rule that most corporate disputes relating to shareholders resolutions cannot be arbitrated, as in Poland as such disputes cannot be settled amicably.

Significant confusion remains, then, on the question of which disputes may and may not be submitted to arbitration in Poland.

¹¹¹ Mlot, J. & Kucharczyk, K. (2011) at 566.

¹¹² Miedzinski, M. & Kusov, R. (2013) at 3.

(iii) Insolvency and arbitration in Poland

Pursuant to Article 142 of the Polish Act on Bankruptcy and Composition, of February 28, 2003 (the Polish bankruptcy law), any arbitration clause concluded by an entrepreneur loses its legal effect on the day that bankruptcy is declared, and any pending arbitration proceedings shall be then discontinued.

This latter provision in particular has proved to be problematic, as in 2014 several parties in the construction industry that were involved in arbitration proceedings were pronounced bankrupt. In some cases the bankruptcy was declared at an advanced stage of the arbitration proceedings. Nonetheless, the proceedings were required to be immediately discontinued, resulting in a significant loss of both time and money for all parties to the arbitration agreement.

The impact of Polish bankruptcy law on arbitration agreements is inconsistent with the approach adopted in many EU Members States (such as the Netherlands, the UK, or Germany) and Switzerland, and can have serious effects on innocent parties, who are forced to abandon even nearly-completed arbitration proceedings in order to recommence proceedings under a different mechanism than the one for which they bargained.

Leading Arbitral Institutions

1. Court of Arbitration of the Polish Chamber of Commerce
Visit: Logistics of the Study precluded a visit to the Court
Questionnaire: Responses included in Annex
2. The Court of Arbitration at the Polish Confederation Lewiatan
Visit: Logistics of the Study precluded a visit to the Court
Questionnaire: No responses received

2.2.23. Portugal

Overview

While the adoption in 2011 of Portugal's current arbitration law occurred as a requirement for receiving "bail out" funding from the International Monetary Fund and the European Union, it is important to acknowledge that the process of drafting the new law commenced in early 2009, prior to the financial crisis that ultimately led to the need for a bail-out agreement. That is, while the timing of the adoption of Portugal's new arbitration law was ultimately imposed from outside the Portuguese government, the recognition of the need for reform had already been made prior to that time. The context of the adoption of Portugal's current arbitration law, then, should not be taken to indicate a negative view of arbitration on the part of Portuguese legislators or the Portuguese legal institutions.

Indeed, one of the notable features of the responses given by Portuguese respondents to the Survey of Arbitration Practitioners undertaken as part of this Study is the positive description given by Portuguese respondents of the views regarding arbitration of both Portuguese legislators and Portuguese judges.¹¹³ Portuguese respondents on average described both Portuguese legislators and Portuguese judges as having between an Adequate and a High understanding of arbitration, and described both Portuguese legislators and Portuguese judges as having a Positive attitude towards arbitration. This is, quite simply, not the picture of a State forced to adopt a new arbitration law by external

¹¹³ Details of the responses provided to the questions in the Survey, both by respondents Survey-wide and specifically by respondents who identified Portugal as their State, are included in an Annex to this Study.

forces, but rather of one in which arbitration has gained a significant degree of institutional support.

Nonetheless, arbitration in Portugal, while increasing in popularity, remains less developed than in many European States, and Portuguese respondents reported arbitration constituting a slightly lower proportion of their work than was reported on average by respondents Survey-wide. Moreover, Portuguese respondents also reported spending longer in their profession before their first involvement in arbitration than did respondents Survey-wide, and also reported working more years before arbitration became their primary field than did respondents Survey-wide.

While Portuguese respondents reported international commercial arbitration constituting a lower proportion of their arbitration work than did respondents Survey-wide, Portuguese respondents also reported domestic commercial arbitration constituting a substantially larger proportion of their work than did respondents Survey-wide. However, when asked to estimate the proportion of domestic commercial contracts and international commercial contracts entered into in Portugal in the past five years that contained an arbitration clause, Portuguese respondents estimated amounts equivalent to those estimated by respondents Survey-wide with respect to their own States. Estimates of this nature cannot, of course, serve as accurate guides to the actual number of arbitration agreements included in contracts in a State, but they provide important information on the experience of arbitration professionals regarding the degree to which arbitration has been incorporated into a State's business practices.

These results just described are consistent with the picture of a jurisdiction in which arbitration was not traditionally popular, and so opportunities to enter the field were restricted, but in which arbitration is growing as a field of practice. Few Portuguese arbitration specialists have yet to achieve international recognition, but anecdotal evidence and the results described above suggest that arbitration has grown in acceptance in Portugal, and is steadily becoming more common.

Moreover, while Portuguese respondents reported domestic arbitrations in which they had participated in the past five years concluding more slowly than did respondents Survey-wide, they reported international arbitrations in which they had participated in the past five years concluding in a period of time equivalent to that reported by respondents Survey-wide. In addition, while Portuguese respondents reported annulment applications being made for a larger proportion of both domestic and international arbitral awards than were reported on average by respondents Survey-wide, they reported lower rates for international arbitrations than for domestic arbitrations. Attempts at annulment are likely to be more common in States in which arbitration is still a growing field, as well as in one in which a modern arbitration law limiting court involvement in arbitration has only recently been adopted, so it is perhaps unsurprising that attempts at annulment are more common in Portugal than they are Survey-wide. However, the lower rate of annulment applications in international arbitrations than in domestic arbitrations, a difference not mirrored in the responses of respondents Survey-wide, when combined with the conduct of international arbitrations at a speed equivalent to that reported Survey-wide, suggests that at least at the higher levels of the profession, arbitration in Portugal operates at a level consistent with international standards.

One of the primary motivations for the apparent growing acceptance of arbitration in Portugal is also one of the obstacles to Portugal's development as a seat for international arbitrations, namely the speed of Portuguese courts. As already noted, Portuguese respondents evaluated Portuguese judges positively in terms of both their understanding of arbitration, and their attitude towards it, and Portuguese respondents also on average described Portuguese courts as adopting between a Neutral and a Liberal approach to the

interpretation of both the validity and the scope of arbitration agreements, equivalent to the description provided on average by respondents Survey-wide with respect to their own national courts. However, it is notable that the inclusion in the bail-out agreement of the requirement that a new arbitration law be adopted was primarily a response to recognised problems with delay and backlog in Portuguese court proceedings.

Consistent with this fact, Portuguese respondents on average reported the enforcement of both domestic and foreign arbitral awards in Portugal as taking longer than was reported on average by respondents Survey-wide with respect to their own States. Portuguese respondents on average reported enforcement of domestic awards as taking 7-12 months, and enforcement of foreign awards as taking 13-12 months. By comparison, respondents Survey-wide on average reported enforcement of both domestic and foreign awards as taking only 4-6 months. Similarly, when asked to evaluate the importance of certain features of a transaction with respect to their impact on the decision to recommend inclusion of an arbitration agreement in a related contract, Portuguese respondents regarded the need for a speedy resolution of disputes as a more important consideration supporting arbitration than did respondents Survey-wide.

Arbitration has, of course, often developed in response to perceived weaknesses in national court systems. However, arbitration never functions entirely independently of national courts. Consequently, so ongoing problems regarding the speed of Portuguese courts will unavoidably have a negative impact on the ability of Portugal to expand its presence in international arbitration. Overall, however, it is clear that Portugal is not a State in which a relatively new system of arbitration is struggling to emerge against a background of resistance by traditional legal and governmental institutions. Rather, the obstacles faced by Portuguese arbitration appear primarily to be practical, rather than ideological, as support for arbitration among both courts and legislators in Portugal appears to be strong. It is, therefore, reasonable to expect that arbitration in Portugal will continue to grow, and Portugal will also gradually develop more recognition within the international arbitration community.

Focus

(i) Revision of Portuguese Arbitration Law

In December 2011 Portugal reformed its Arbitration Law; the new Law is inspired by the UNCITRAL Model Law, but it also contains some original provisions. The reformed Arbitration Law is innovative in many respects: first of all, it expands the area of arbitrability, which now encompasses not only disposable rights, but every pecuniary dispute, as well as disputes not involving pecuniary interests but capable of settlement. Furthermore, the new Law provides that the arbitration agreement must be in writing, but also expressly recognizes the validity of agreements concluded through modern means of telecommunication.

The 2011 reform addresses the issue of multi-party arbitration: in principle, multiple claimants or multiple respondents shall jointly appoint one arbitrator, when the arbitration agreement provides for such a right. However, if the parties have conflicting interests, the competent State court can appoint all of the members of the tribunal.

Before the reform, the provisions for the challenge of State judges applied to the challenge of arbitrators as well; now, the Portuguese Lawmaker sets forth a special procedure for the challenge of arbitrators, which parties can initiate where certain circumstances give rise to justifiable doubts as to impartiality or independence, or in cases where the arbitrator lacks qualifications parties have agreed upon.

The new Law expressly recognizes the power of arbitral tribunals to issue interim measures. Under Article 22, arbitrators also have the power to grant *ex parte* preliminary orders: this provision has a deeply innovative effect on the Portuguese system, which did not recognize preliminary orders under the previous regime. Interim measures ordered by arbitral tribunals can be enforced upon application before the competent State court.

One of the major innovations of the new law relates to the challenge of arbitral awards. Pursuant to the previous regime, parties could bring an appeal against an arbitral award: such solution was detrimental to the finality of the award, as it made it possible to apply for the annulment of the award on a wide range of grounds, similarly to what happens with State court judgments. The new Article 46 of the Arbitration Law sets forth the grounds for challenge, which are mainly limited to procedural reasons; for example, the award can be set aside if it deals with a dispute which is not covered by the arbitration agreement, or if it rules on matters that should not have been analysed because no party has brought a claim in that regard, or if the arbitral tribunal was constituted in breach of the rules the parties had agreed on. The award can also be set aside if the claim was not arbitrable or if the arbitral decision runs contrary to international public policy. On the contrary, arbitral awards can no longer be appealed, unless the parties have expressly provided for such a possibility in their agreement.

In conclusion, the new Portuguese Arbitration Law constitutes a fundamental change and contributes to affirming Portugal as a friendly seat of arbitration.

(ii) Tax Arbitration

In 2011, Portugal has introduced a specific type of arbitration for tax disputes. Taxpayers have the possibility to request arbitration, as an alternative to State court litigation, for a wide range of tax cases. The use of arbitration can have several advantages in this context, such as for example the duration and costs of the proceedings: the arbitral tribunal has a six month time limit to render the award, which can be extended for no more than another six months. Cases can be decided by a sole arbitrator or by a panel of three arbitrators, depending on the nature of the dispute and on the choice of the parties. In any case, the law requires particular standards of impartiality and independence.

Portuguese tax arbitration differs from common arbitration in civil and commercial matters from many points of view: it is not entirely regulated by private autonomy, but carried out by a specific Arbitration Centre, created by the Ministry of Justice. Therefore, tax arbitration constitutes an equivalent to State tax litigation, which Portugal implemented in order to face the need for a fast and reliable system of adjudication of tax disputes. Awards are final and can only be challenged under specific and limited circumstances.

(iii) Mandatory Arbitration of Pharmaceutical Patent Disputes

From December 2011, pharmaceutical patent disputes concerning the commercialization of generic medicines must be resolved through mandatory arbitration. In these cases, one of the parties argues that the commercialization of a generic medicine infringes its patent rights. In this field, Portuguese law provides for a special procedure: whenever the national pharmaceutical agency (Infarmed) receives an application for approval of a generic pharmaceutical product, it publishes a notice; within thirty days, the innovator can file a request for arbitration (either *ad hoc* or institutional), if it deems that the generic medicine is in breach of its IP rights. This form of compulsory arbitration covers interim injunctions as well, thus entirely excluding these disputes from the jurisdiction of State courts. This is an exception to the general rule, according to which intellectual property disputes are normally dealt with by a specialized IP court.

The creation of a system of mandatory arbitration can have the positive effect of enhancing celerity. However, it also raises some concerns, since it makes it impossible for parties to resort to State courts. When arbitration is imposed by the law, it loses its consensual foundation; in light of this, compulsory arbitration could be deemed unconstitutional, since it infringes to right to access to public justice. In Italy, similar laws (attempting to introduce mandatory arbitration in the field of public procurement) have been declared illegitimate by the Constitutional Court.

Leading Arbitral Institutions

1. Centre for Commercial Arbitration of the Portuguese Chamber of Commerce and Industry
Visit: Logistics of the Study precluded a visit to the Court
Questionnaire: No responses received

2.2.24. Romania

Overview

Although in 2013 Romania adopted a new arbitration law primarily based upon the UNCITRAL Model Law, this new law deviates in some significant ways from the standards incorporated into the Model Law. In addition, prior to a change in its rules in 2014, the Court of International Commercial Arbitration attached to the Romanian Chamber of Commerce and Industry, the leading arbitral institution in Romania, operated under a procedure in which arbitrators in any arbitration held under the auspices of the Court were selected by the President of the Court, rather than by the parties. As already noted, this rule has since been changed, however in combination with the manner in which Romania's arbitration law deviates from the UNCITRAL Model Law, Romania appears to be a country in some respects still uncomfortable with the freedom from institutional control that characterises arbitration in leading jurisdictions.

While Romania is developing a body of experienced and able arbitration specialists, arbitration remains comparatively less developed in Romania than in many European jurisdictions, and Romanian respondents to the Survey of Arbitration Practitioners undertaken as part of this Study reported that arbitration constituted a smaller proportion of their work than did respondents Survey-wide.¹¹⁴ In addition, Romanian respondents reported a more strongly domestic practice than did respondents Survey-wide, with domestic commercial arbitration constituting a larger proportion of their work than was reported by respondents Survey-wide, and international commercial arbitration a smaller proportion of their work than was reported by respondents Survey-wide.

Notably, while this might suggest a strong domestic embrace of arbitration in Romania, when respondents to the Survey were asked to estimate what proportion of domestic commercial contracts and of international commercial contracts entered into in their State in the past 5 years contained an arbitration agreement, Romanian respondents not only provided lower estimates with respect to both types of contract than did respondents Survey-wide with respect to their own States, but Romanian respondents provided lower estimates with respect to domestic commercial contracts than with respect to international commercial contracts. Estimates of this nature cannot, of course, serve as accurate guides to the actual number of arbitration agreements included in contracts in a State, but they provide important information on the experience of arbitration professionals regarding the degree to which arbitration has been incorporated into a State's business practices. The indications are, that is, that rather than Romania being a State with a strong domestic

¹¹⁴ Details of the responses provided to the questions in the Survey, both by respondents Survey-wide and specifically by respondents who identified Romania as their State, are included in an Annex to this Study.

embrace of arbitration, but whose practitioners are not highly active in international arbitrations, arbitration is simply not yet broadly embraced in Romania, either for domestic commercial transactions or for international commercial transactions.

This being said, however, it should be noted that while Romanian respondents reported domestic arbitrations in which they had been involved in the past five years taking longer than was reported by respondents Survey-wide, they reported international arbitrations in which they had been involved in the past five years taking an equivalent period of time as was reported by respondents Survey-wide. In addition, while Romanian respondents reported applications for annulment being more common with respect to awards in both domestic and international arbitrations in which they had been involved in the past five years than were did respondents Survey-wide, they reported a lower proportion of annulment applications in international arbitrations than in domestic arbitrations. Higher rates of application for annulment are to be expected in growing arbitral jurisdictions, particular where a modern arbitration law has only recently been adopted, both because parties may be uncomfortable with arbitration and because it will as yet be unclear how likely it is that courts will grant an annulment. However, the lower rates of applications for annulment in international arbitrations, combined with the equivalent speed of such arbitrations reported by Romanian respondents compared to speeds reported by respondents Survey-wide, suggest that the highest levels of arbitration practice in Romania match international standards.

This being said, it is notable that when respondents to the Survey were asked to recommend five States as a seat for an international arbitration, only 64.29% of Romanians recommended Romania. This is certainly higher than in some European States, but is far lower than the level found in leading arbitration States, and so suggests a level of discomfort with arbitration in Romania among Romanian respondents.

It has already been suggested that one reason for this discomfort may be the legal and institutional structure within which arbitration currently operates in Romania, and indeed while Romanian respondents did not describe Romanian law in negative terms, they did on average describe it as less supportive of arbitration than did respondents Survey-wide with respect to their own national laws. Similarly, while Romanian respondents did not describe Romanian legislators or judges negatively, they regarded both legislators and judges in Romania as having a lower level of understanding of arbitration and a less positive attitude towards arbitration than did respondents Survey-wide with respect to legislators and judges in their own States.

While there are indications that arbitration in Romania still faces obstacles, particularly with respect to the traditional freedom of arbitration from governmental and institutional control, the strength of the leading Romanian arbitration specialists, and the fact that Romanian respondents described neither Romanian legislators nor Romanian judges in negative terms, suggests that these problems are far from insoluble, and Romania has the capacity to increase substantially as an arbitral State.

Focus

(i) Designation of arbitrators by the parties to an arbitration

The Court of International Commercial Arbitration attached to the Romanian Chamber of Commerce and Industry (CCIR Court) is the leading arbitral institution in Romania, and in 2014 adopted a new set of Arbitration Rules ('new Arbitration Rules') that introduced an important change to its previous rules concerning the appointment of arbitrators.

Under the Rules of Procedure in force prior to May 6, 2014, parties lacked the right to select arbitrators to hear their dispute. Instead, sole control over the designation of all

arbitrators on a tribunal was exercised by the President of the CCIR Court. In turn, arbitrators were chosen exclusively from the CCIR's list of arbitrators. This procedure thereby deprived parties of one of the primary benefits of arbitration, namely the ability to select the individual(s) who would have the responsibility of deciding the parties' dispute.

The new Arbitration Rules entered into force on June 5, 2014 and in the respect of the rules regarding the appointment of arbitrators on May 6, 2014.¹¹⁵ Under the new regime parties have gained the right to appoint arbitrators in accordance with the method specified in their arbitration agreement. Where no method is specified in the agreement, the new Arbitration Rules provide a default procedure that also respects party choice.

Under Article 11(1) of the new Arbitration Rules, an arbitral tribunal should consist of one or three arbitrators, depending on the wording of the arbitration agreement. In cases where the parties do not specify the number of arbitrators to hear a dispute, the default rule provides for the resolution of a dispute by three arbitrators (Article 11(2) of the new Rules of the CCIR Court). While the President of the CCIR Court retains a role in the arbitrator selection process, this role is now reduced to the traditional role played by arbitral institutions. The President will, therefore, act as an Appointing Authority only in the following situations: (1) where neither the plaintiff nor the defendant appoints their arbitrators; (2) when the parties disagree on the appointment of a sole arbitrator; or (3) when the arbitrators previously appointed by the parties disagree on the appointment of the chairman (Article 17(1) of the new Rules of the CCIR Court).

Particularly significantly, whenever a defendant appoints its own arbitrator after the President of the CCIR Court has made an appointment on the defendant's behalf, but before the arbitral tribunal has been formally constituted, the decision of the President of the CCIR becomes void, and the defendant's preferred arbitrator is appointed (Article 17(3)).

In addition, and in recognition of the controversial nature of the appointment procedures used prior to May 6, 2014, transitional provisions were also introduced, which allow parties to arbitrations registered with the CCIR Court as of the date of entry into force of the new Rules to alter, in certain situations, the composition of the arbitral tribunal previously appointed to hear their case. Specifically, if the first hearing had not yet been concluded, parties were given the right to replace, within ten days of entry into force of the new Rules, any arbitrator appointed under the old Rules, with an arbitrator of their choice. (Article 4(3) of the Decision 6 of April 10, 2014, issued by the President of the Romanian Chamber of Commerce and Industry, regarding the approval of the regulation on the organisation and functioning of the Romanian Court of International Commercial Arbitration (the Decision of April 10, 2014)). Where the first hearing had already concluded, replacement of arbitrators was only permitted with the consent of both parties, and if made prior to the commencement of the next hearing after entry into force of the new Rules (Article 4(4) of the Decision of April 10, 2014).

While this change is clearly an improvement, and grants to participants in arbitrations administered by the CCIR Court the important right of participation in arbitrator selection, a problem nonetheless remains regarding arbitrations registered with the CCIR Court as of May 6, 2014. Specifically, under Article 619(3) of the Romanian Civil Procedure Code (CPC), unless parties agree otherwise, the institutional rules that govern an arbitration are those that are in force when the arbitration is commenced. As a result, any party to an arbitration filed with the CCIR prior to May 6, 2014, that exercised its right to select a new arbitrator prior to the first hearing, and without the consent of the other party or parties to the arbitration, may have acted in violation of Romanian law. This may create a ground on

¹¹⁵ Olaru Cretu, S. & Ghervas, D. (2014).

which any award delivered by the tribunal in such arbitration can be set aside, as the tribunal was not constituted in accordance with the agreement of the parties or the applicable law.¹¹⁶ It is, however, currently unclear whether any such arbitrations exist.

(ii) Disputes related to the transfer or the establishment of rights *in rem* over immovable property

Under Article 548(2) of the Romanian CPC, an arbitration agreement concerning a dispute related to the transfer or the establishment of rights *in rem* over immovable property must be authenticated by a public notary, or it will not be operative. While on its face a straightforward provision, this requirement can create difficulties for parties unfamiliar with arbitration law.

Parties may, for example, enter into a preliminary sale agreement regarding a piece of immovable property. Under Romanian law such an agreement does not need to be authenticated by a notary. Any disputes arising out of such an agreement, however, would concern the transfer of rights *in rem* over immovable property. Consequently, if the agreement contained an arbitration clause, that clause would be null, under Article 548(2), as it was not authenticated by a notary.

In addition, awards arising from an arbitration concerning the transfer or establishment of rights *in rem* over immovable property must in turn be submitted to a court of law or public notary, so that a court decision or notarised deed can be issued and then recorded in the Land Book. Not only does this requirement impede the speed of the resolution of such disputes by arbitration, but as the CPC provides no guidance on the standards that should be applied by a reviewing court or notary, it raises the risk that substantive review of the award might be undertaken.¹¹⁷

(iii) Review by courts of the fees of arbitrators in domestic arbitrations

Under Article 598 of the CPC, any party involved in a domestic arbitration in Romania may petition a court to review the fees and costs of the arbitrators who addressed their dispute. The court possesses the right to determine for itself an appropriate fee, and that decision is not subject to appeal.¹¹⁸

Such a provision appears to reflect a view on the part of Romanian legislators that overcharging by arbitrators is a serious problem in domestic arbitration. Whether or not such a concern is justified, however, this provision risks creating a situation in which the best arbitrators will be unwilling to participate in domestic arbitrations unless both parties agree to waive their right to challenge the arbitrators' fees and costs in court. As a result, it gives parties a mechanism by which they can potentially prevent the opposing party selecting its preferred arbitrator, merely by refusing to waive the right to challenge the arbitrators' fees and costs.

Leading Arbitral Institutions

1. Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania

Visit: Logistics of the Study precluded a visit to the Court

Questionnaire: No responses received

¹¹⁶ Olaru Cretu, S. & Ghervas, D. (2014).

¹¹⁷ Popescu, A. & Oana, A. (2014) at 67.

¹¹⁸ Ibid.

2.2.25. Scotland

Overview

Although Scotland and England, Wales and Northern Ireland are formally part of the same State they possess substantially distinct legal systems, with different sources of substantive law, and most importantly for the present Study, different arbitration laws. Indeed, while English arbitration has been regulated since 1996 by the English Arbitration Act, prior to 2010 Scottish arbitration law was regulated in two different ways, with international arbitration being regulated by legislation fundamentally based on the UNCITRAL Model Law, and domestic legislation being regulated predominantly by often old caselaw. This situation changed in 2010 with the adoption of the Scottish Arbitration Act, based primarily on the 1996 English Arbitration Act.

Arbitration in Scotland failed to develop substantially under Scotland's pre-2010 law, and consequently remains a relatively underdeveloped field of practice, although the positive reception received by the 2010 Arbitration Act suggests development will increase. Whatever the prospects for the future, however, it is notable that 81.25% of Scottish respondents to the Survey of Arbitration Practitioners undertaken as part of this Study reported that arbitration was not their primary field of work.¹¹⁹ In line with this result, Scottish respondents also reported that arbitration constituted a smaller proportion of their work than did respondents Survey-wide.

More problematically for the development of arbitration in Scotland, Scottish respondents described the level of understanding of arbitration of business people in Scotland as lower than did respondents Survey-wide with respect to business people in their own States, and described the attitude toward arbitration of business people in Scotland as more negative than did respondents Survey-wide with respect to business people in their own States. Scottish respondents were far more positive about the level of understanding of arbitration and the attitude towards arbitration of both legislators and judges in Scotland, the support of whom is essential for arbitration's successful development. However, ultimately arbitration, being voluntary, is a "customer"-led field, and without the support of the Scottish business community few opportunities will arise for Scotland's newly supportive approach to arbitration to be evidenced.

While the small Scottish market for arbitration means that there are currently few individuals in Scotland who actively specialise in arbitration, the central role played by the Scottish Branch of the Chartered Institute of Arbitrators in the development of Scotland's new arbitration law, combined with the clearly positive view of that law held by Scottish respondents to the Survey, indicates both a strong interest within the Scottish legal community in the development of arbitration in Scotland, and a confidence within that community that Scotland's new legal structures for arbitration are suitable for that development. Moreover, as already noted, arbitration has the strong support of both Scottish legislators and Scottish judges. There are, then, good reasons to be optimistic about the future of arbitration in Scotland.

That said, however, it should be noted that when Scottish respondents were asked to recommend five States as the seat for an international arbitration, Scotland was only the second most recommended seat, recommended by 86.67% of Scottish respondents. The seat most consistently recommended by Scottish respondents was England, Wales and Northern Ireland, which was recommended by 100% of Scottish respondents. That is, confidence in Scottish arbitration is high amongst Scottish respondents, but those respondents have even more confidence in arbitration in England, one of the world's

¹¹⁹ Details of the responses provided to the questions in the Survey, both by respondents Survey-wide and specifically by respondents who identified Scotland as their State, are included in an Annex to this Study.

leading arbitral seats, the State whose Arbitration Act served as the primary basis of the 2010 Scottish Arbitration Act, and a jurisdiction with which Scotland shares both an island and a State. This is an important qualification because however favourable Scotland's new legal infrastructure for arbitration may be, Scotland simply cannot yet compete with England in terms of arbitration expertise or experience. There is good reason to think this will gradually change to a reasonable extent, and many reasons to be optimistic about the future of arbitration in Scotland, but the low levels of embrace of arbitration by Scottish business people and the unavoidable comparisons that will be drawn between arbitration in Scotland and arbitration in England will likely slow, at least to some extent, Scotland's development into a prominent arbitral jurisdiction.

Focus

(i) Confidentiality of arbitration

Arbitration in Scotland is currently governed by the provisions of the Arbitration (Scotland) Act 2010 that entered into force on June 7, 2010 (the Scottish Arbitration Act). Arguably because the history of arbitration in Scotland is relatively long, prior to 2010 the law on arbitration in Scotland was largely fragmented, being spread over a number of different acts and statutes, some which dated back as far as 1695, as well as some caselaw that was often similarly antiquated. Unsurprisingly, this could create confusion for prospective parties to arbitration.

The Scottish Arbitration Act now provides a single integrated regime covering all forms of arbitration except consumer arbitration, which is instead covered by the English Arbitration Act, as consumer protection is reserved to the United Kingdom Parliament. The Act was adopted in the hope of increasing the popularity of Scotland as a seat of both domestic and international arbitration. Notably, rather than merely adopting the UNCITRAL Model Law, the Scottish Arbitration Act was passed following in-depth research on foreign arbitration laws and international arbitration practices conducted by the Scottish Branch of the Chartered Institute of Arbitrators (CIArb).¹²⁰

The Scottish Arbitration Act is one of the very few arbitration acts worldwide that specifically provides for the confidentiality of arbitration, this issue most often being addressed in caselaw. Confidentiality is addressed in Rule 26, which imposes a confidentiality obligation on all parties to arbitration proceedings as well as on arbitrators, although parties can opt out of this obligation. Some exceptions to this strong confidentiality obligation apply, including in arbitrations involving public officials who are under a duty to comply with "open government" policies included in Scottish law (e.g. under the Freedom of Information (Scotland) Act 2002). Additionally, the Scottish Arbitration Act requires that provides that any party to court proceedings regarding an arbitration may apply for anonymity, and the court is obliged to grant such application except in certain 'public interest' circumstances.

(ii) Appeal on points of Scots law

Under the law in force prior to the adoption of the Scottish Arbitration Act, parties were permitted to refer all points of Scots law to the courts at any point in the arbitration proceedings. This served as a major barrier to the development of arbitration, and contributed to significant delays in arbitration proceedings in Scotland.

The new Scottish Arbitration Act limits court review on points of Scots law in important ways, there being no appeal at all possible on points of non-Scots law. Firstly, while Rule

¹²⁰ Dundas & Bartos (2010)

69 allows parties to appeal on points of Scots law to the Outer House, the first instance civil court in Scotland, this possibility can be waived by the parties through exclusion of such appeals in their arbitration agreement.

Generally, only two levels of appeal are available under the Act, and other than in respect of awards, no appeal is possible from any first instance decision. In addition, even when a court referral has been made, the arbitration tribunal is permitted to continue with proceedings, rather than suspending proceedings pending the court's ruling.

An award delivered by a tribunal may also be challenged in the Outer House on the ground of legal error, although an agreement that the award need not contain reasons is treated as an agreement to waive the possibility of court review on the ground of legal error (Rule 51(2)(c)). Appeal of the Outer House's decision is possible to the Inner House, but only with leave of the Outer House. The Outer House's decision on whether or not to grant leave cannot be appealed. Moreover, leave will only be granted where the proposed appeal will raise an important point of principle or practice or when there are other "compelling reasons" for the Inner House to consider the appeal. It is no longer possible to lodge a legal error appeal before the UK Supreme Court.

In the four years since the adoption of the Scottish Arbitration Act, there have been only eight reported appeal proceedings concluded under the Act, with anecdotal evidence indicating the existence of two more cases heard and awaiting judgment.

(iii) Scottish Short Form Arbitration Rules

Following the passage of the Scottish Arbitration Act, the Scottish Branch of the Chartered Institute of Arbitrators issued its Short Form Arbitration Rules, which entered into force on November 15, 2012 (the 'Short Form Rules').¹²¹ The Short Form Rules provide simplified procedures for the resolution of disputes of £25,000 or less, although they may be applied to larger disputes upon agreement of the parties. Proceedings under the Short Form Rules are intended to be expeditious, with an approximate timetable limiting such proceedings 77 days.

The Short Form Rules are tailored for small business disputes or disputes involving single traders.¹²² For this reason, they have been designed to be accessible to arbitration users, rather than only to legal professionals, and a Guidance Note is included to explain each step of the proceedings to be undertaken by the parties.

Adoption of the Short Form Rules, and in particular the decision to structure the Rules in a way that will make them accessible to parties, rather than only to legal professionals, is an important step for arbitration in Scotland. It provides a mechanism through which parties traditionally excluded from arbitration can take advantage of the benefits that arbitration can provide.

Leading Arbitral Institutions

1. Scottish Arbitration Centre

Visit: Logistics of the Study precluded a visit to the Centre

Questionnaire: Responses included in Annex

¹²¹ The Short Form Arbitration Rules are available on the CI Arb's website at:

<http://www.ciarb.org/scotland/arbitration/scottish-short-form-arbitration-rules/scottish-short-form-arbitration-rules-1.php>.

¹²² Dundas & Bartos (2010)

2.2.26. Slovakia

Overview

Arbitration in Slovakia is currently in a very troubled state, due primarily to a combination of structural weaknesses in Slovakia's current arbitration law and opposition to arbitration from within the Slovak judiciary, this opposition to a significant extent being generated by the problems caused by the weaknesses in the law. Indeed, Slovak respondents to the Survey of Arbitration Practitioners undertaken as part of this Study described Slovak law as the least supportive of arbitration, alongside Latvian law, of any State included in this Study, as rated by respondents from each State.¹²³

The difficulties with Slovakia's current arbitration laws are discussed in more detail in the Focus section of this chapter, and in the discussion of Slovak law included in an Annex to the Study, however the primary difficulty is that the laws applicable to arbitration in Slovakia have resulted in the creation of a large number of unregulated arbitral institutions, many run purely for profit and with no serious concern for the fairness or the honesty of the arbitral proceedings they administer. In addition, the lack of a distinction in Slovak law between consumer and commercial arbitration has resulted in the legal interpretations adopted by courts for the protection of consumers also being applied in the context of commercial arbitrations, where they are often much less appropriate. Slovakia is certainly not unique in having unregulated arbitral institutions, and is also not unique in not having distinct legislative provisions regulating consumer and commercial arbitration. However, the impact these features of Slovak arbitration law have had on arbitration in Slovakia underlines the importance of adapting the regulation of arbitration to local needs and characteristics.

Despite the foregoing situation, and the consequent very large number of arbitral institutions in Slovakia, and indeed to some degree because of this situation, arbitration as a specialised field of practice remains underdeveloped in Slovakia. Indeed, not a single Slovak respondent to the Survey of Arbitration Practitioners stated that arbitration was his/her primary field of work, including those individuals who had been directly invited to take the Survey because of their prominence within arbitration in Slovakia. In line with this result, Slovak respondents also reported arbitration constituting a smaller proportion of their work than did respondents Survey-wide. Similarly, when asked to estimate the proportion of domestic commercial contracts and international commercial contracts entered into in Slovakia within the past five years that contained an arbitration clause, Slovak respondents provided lower estimates than did respondents Survey-wide with respect to their own States. Estimates of this nature cannot, of course, serve as accurate guides to the actual number of arbitration agreements included in contracts in a State, but they provide important information on the experience of arbitration professionals regarding the degree to which arbitration has been incorporated into a State's business practices.

Notably, this lack of development of arbitration in Slovakia has occurred despite the reported slowness of Slovak courts, and ongoing concerns about the independence of the Slovak judiciary. Notably, Slovak respondents reported that arbitrating a dispute in Slovakia is between Slightly Faster and Much Faster than litigating the same dispute in Slovak courts, and that the cost of arbitrating a dispute in Slovakia is between Neutral and Slightly More Expensive than the cost of litigating the same dispute in Slovak courts. Moreover, while Slovak respondents on average reported the domestic arbitrations in which they have been involved in the past five years taking longer than did respondents Survey-wide, they reported international arbitrations taking equivalent amounts of time as reported

¹²³ Details of the responses provided to the questions in the Survey, both by respondents Survey-wide and specifically by respondents who identified Slovakia as their State, are included in an Annex to this Study.

by respondents Survey-wide. Similarly, while Slovak respondents reported annulment applications being made against a slightly higher proportion of awards delivered in domestic arbitrations in which they have been involved over the past five years than did respondents Survey-wide, they also reported that not a single annulment application had been brought against an award delivered in an international arbitration in which they had been involved in the past five years. There are indications, then, that despite the relative underdevelopment of arbitration in Slovakia, at the highest levels of arbitration practice in Slovakia, high standards are maintained.

While the damage done to the reputation of arbitration in Slovakia by the situation described at the beginning of this Overview is clearly partly responsible for the underdevelopment of arbitration as a professional practice in Slovakia, despite the benefits it can provide over litigation in Slovak courts, broader institutional obstacles also appear to be an important factor. Slovak respondents, for example, described Slovak judges as having both a Low understanding of arbitration and a Negative attitude towards arbitration. In addition, they described Slovak courts as Strict regarding both the validity and the scope of arbitration agreements, a description far more negative than that on average given by respondents Survey-wide regarding courts in their own State, which was between Neutral and Liberal.

The current problems with arbitration in Slovakia have certainly not gone unnoticed, and indeed efforts are currently underway to reform Slovak arbitration law. However, as discussed in the Focus section of this chapter, these efforts have not yet come to fruition, and indeed have in some important ways been opposed by the Slovak judiciary. Given that Slovak respondents on average described Slovak legislators as having both a lower understanding of arbitration and a less positive attitude towards arbitration than did respondents Survey-wide with respect to legislators in their own States, it is far from clear, particularly given the opposition of the Slovak judiciary, that when the Slovak legislative process has concluded, the problems of arbitration in Slovakia will have been resolved. It is perhaps unsurprising, given this context, that when Slovak respondents were asked to recommend five States as the seat of an international arbitration, only a single Slovak respondent recommended Slovakia, making Slovakia the seventh most popular seat for international arbitration even among Slovakian respondents.

Focus

(i) Lack of differentiation between commercial and consumer arbitration

The Slovak Arbitration Act in its current form does not distinguish between consumer and commercial arbitration. This has resulted in abuses in the administration of consumer disputes by various arbitral institutions whose standards of conduct diverged from the procedural safeguards for consumers established under Slovak law and EU law.

In turn, this has contributed to a number of interpretations of the Slovak Arbitration Act being adopted by courts with the goal of protecting consumers, which were then also applied to commercial arbitration because of the Act's failure to distinguish between the two types of procedure. This has included, for example, the invalidation of arbitration agreements incorporated into a contract by reference, and the substantive review by courts of arbitration awards in the course of enforcement proceedings.

In 2010 the Slovak Parliament considered an amendment to the Slovak Arbitration Act that would have addressed perceived problems with consumer arbitration by adopting enhanced control over arbitral institutions. Specifically, the law proposed requiring governmental permission for the establishment and operation of arbitral institutions, as well as making such institutions liable for actions taken by arbitrators in arbitrations administered by them, including for perceived delays in the arbitral process. In addition, consumer organisations

were to be granted the power to petition courts to prevent specific arbitral institutions from administering consumer arbitrations. Further restrictions were also proposed. After a veto by the Slovak President, the amendments were not adopted.

While the proposals considered in 2010 were in many cases not undesirable as a form of consumer protection, the failure of Slovak law and courts to distinguish between consumer and commercial arbitration ultimately undermined their workability. Arbitration by its nature is a highly flexible mechanism, and can be adapted to resolve effectively many different types of disputes. However, this flexibility also means that failure to attend properly to the large diversity of situations in which arbitration can be used, can easily lead to poor regulatory decisions.

The difficulties encountered by Slovakia in simultaneously protecting consumers involved in arbitration and providing participants in commercial arbitration the flexibility they desire, serve as an effective illustration of the need to diversify regulation of arbitration to match arbitration's own diversity.

(ii) Domestic opposition to proposed amendments to the current arbitration law

In 2012 a legislative committee was appointed by the Ministry of Justice to propose amendments to the current Slovak arbitration law, Act No. 244/2002 Coll. on Arbitration (the 'Slovak Arbitration Act'). The major goal of the committee was to align the provisions of the Slovak Arbitration Act with the 2006 version of the UNCITRAL Model Law.

When the committee's draft amendments were submitted to a public consultation process, strong opposition to the proposals was received from many stakeholders within the judicial establishment, including judges and public prosecutors. This opposition often reflected very negative attitudes towards arbitration.

The opposition focused in particular on proposals for the introduction of separate procedures for consumer and for commercial arbitration, as a means of allowing enhanced protection for consumers without interfering with the autonomy of participants in commercial arbitration. Both the Supreme Court and the General Prosecutor's Office, however, opposed the distinction between consumer arbitration and commercial arbitration and proposed inserting into the new law express provisions protecting "weaker parties" even in commercial arbitrations.

Despite this strong opposition, the draft amendment was nonetheless endorsed by the Slovak cabinet and presented to the Slovak parliament for the final leg of the legislative process in August 2014. It remains to be seen whether the mandate to align commercial arbitration with the UNCITRAL Model Law will eventually gain sufficient political support in Slovakia.

(iii) Large number of arbitral institutions

Arbitration in Slovakia has been significantly affected by the very liberal regime that exists under Slovak law regarding the establishment and operation of arbitration institutions. Because of this liberal regime over 130 permanent arbitral institutions currently exist in Slovakia. More problematically, the lack of control over arbitral institutions means that the conduct of many institutions departs significantly from the professional and ethical standards of major international arbitral institutions.

A proliferation of arbitral institutions might appear to be beneficial to parties, as it increases the range of approaches to the administration of arbitration from which parties can select. In addition, competition amongst institutions can lead to improvements in the services provided. The unregulated nature of arbitral institutions in Slovakia, however, combined

with the absence in Slovakia of a developed arbitral community, means that such benefits are unlikely to be generated.

As institutions are unregulated, the simple fact that an institution exists provides no assurance that it meets even minimum standards of quality or honesty. Moreover, as a basic arbitral institution can be operated at extremely low cost, with no paid employees and a "shared" office (e.g. located at the law firm of its Director), market forces will be inadequate to ensure that low quality or dishonest institutions do not survive. In addition, few individuals or entities will have enough repeat experience of arbitration to enable them to generate personal experience of those institutions that are and are not reliable. Moreover, as Slovak lawyers generally have little experience with arbitration, they will rarely be in a position to provide informed guidance to clients regarding the strengths and weaknesses of the large number of arbitrations in Slovakia.

The legislative committee convened to propose changes to the Slovak Arbitration Act included in their recommendations provisions regulating the establishment and operation of permanent arbitral institutions in Slovakia. Under these provisions only chambers of commerce, non-profit professional associations, and entities specified by law would be permitted to found arbitral institutions in Slovakia. This would, for example, prevent arbitral institutions from being run for the primary purpose of generating and distributing profit to their founders, a situation that inherently involves a conflict of interest.

While such restrictions are generally undesirable, as they limit competition and so can lead to lower quality institutions, they are a potentially beneficial interim measure, which will help generate confidence in institutional arbitration in Slovakia, and consequently assist in the development of a broader and more active arbitral community in Slovakia.

As noted above, however, the proposed amendments have not yet been adopted, and it is currently unclear in what form they might ultimately be adopted after the Slovak parliament's legislative process has concluded.

Leading Arbitral Institutions

1. Court of Arbitration of the Slovak Chamber of Commerce and Industry
Visit: Logistics of the Study precluded a visit to the Court
Questionnaire: No responses received
2. Permanent Arbitration Court of the Slovak Banking Association
Visit: Logistics of the Study precluded a visit to the Court
Questionnaire: Responses included in Annex

2.2.27. Slovenia

Overview

Slovenia has a relatively long history of active engagement with arbitration, with what is now called the Ljubljana Arbitration Centre, Slovenia's leading arbitration institution, having operated consistently since 1928. Moreover, while voluntary arbitration declined radically in many Eastern European States during the socialist era, both domestic and international arbitration remained in use in Slovenia throughout that period. Yet it was not until 2008 that Slovenian arbitration law, long based on an 1895 Austrian law, was updated. The current Slovenian Arbitration Act, however, is not only based upon the 2006 UNCITRAL Model Law, but expressly states that interpretation of the Act is to be done in the light of international practice regarding the interpretation of the provisions of the Model Law.

Nonetheless, while this means that the contemporary legal structure within which arbitration operates in Slovenia closely reflects contemporary international views on the proper regulation of arbitration, the delay in updating Slovenia's arbitration laws has clearly had an effect. For example, when respondents to the Survey of Arbitration Practitioners undertaken as part of this Study were asked to recommend five States as the seat of an international arbitration, only four non-Slovenian respondents recommended Slovenia, three of them coming from neighbouring Croatia.¹²⁴ Indeed, only 1.30% of respondents Survey-wide recommended Slovenia, making it only the twenty-third most recommended State, alongside Hungary and Romania, of the thirty States included in this Study.

This result can at least partially be explained by the relative newness of Slovenia's arbitration law, and the limited experience foreign practitioners have had with arbitration in Slovenia. However, it is also notable that when respondents to the Survey were asked to estimate the proportion of domestic commercial contracts and international commercial contracts entered into in their State in the past five years that included an arbitration agreement, Slovenian respondents provided lower estimates than were provided by respondents Survey-wide with respect to their own States. Estimates of this nature cannot, of course, serve as accurate guides to the actual number of arbitration agreements included in contracts in a State, but they provide important information on the experience of arbitration professionals regarding the degree to which arbitration has been incorporated into a State's business practices.

These results are also consistent with the fact that Slovenian respondents described Slovenian business people as having both a lower understanding of arbitration and a less positive attitude towards arbitration than did respondents Survey-wide with respect to business people in their own States. There are indications, that is, that even within Slovenia arbitration has not yet developed a reputation as a strong alternative to Slovenian national courts.

This relative lack of engagement with arbitration in Slovenia is particularly notable given that there are strong indications of positive features to the practice of arbitration in Slovenia. For example, when asked to compare the speed of arbitrating a dispute in Slovenia with the speed of litigating the same dispute in Slovenian courts, Slovenian respondents on average described arbitration as Much Faster than litigation in Slovenian courts. Indeed, this is so even though when they were asked to describe the cost of arbitrating a dispute in Slovenia with the cost of litigating the same dispute in Slovenian courts, Slovenian respondents described arbitration in Slovenia as between Neutral and Slightly More Expensive than litigation in Slovenia. According to these results, that is, arbitration in Slovenia provides a considerably more efficient process than litigation in Slovenia, producing a result much more quickly, and at comparatively little extra cost.

Notably, the speed of arbitration in Slovenia does not appear to result solely from a comparative slowness of Slovenian courts. Slovenian respondents, for example, reported both the domestic and the international arbitrations in which they have been involved in the past five years taking less time than did respondents Survey-wide. Moreover, Slovenian respondents also reported the final awards in both the domestic and the international arbitrations in which they have been involved in the past five years being delivered sooner after the end of hearings than did respondents Survey-wide. Indeed, all Slovenian respondents reported the average delivery time of an award being 0-3 months after conclusion of the hearings.

¹²⁴ Details of the responses provided to the questions in the Survey, both by respondents Survey-wide and specifically by respondents who identified Slovenia as their State, are included in an Annex to this Study.

It is also notable that while Slovenian respondents described Slovenian judges as having both a lower understanding of arbitration and a less positive attitude towards arbitration than did respondents Survey-wide with respect to judges in their own States, Slovenian respondents did not describe Slovenian judges negatively. Rather Slovenian judges were described as having an Adequate understanding of arbitration, and a Neutral attitude towards it. Consistent with these results, while Slovenian respondents described Slovenian Courts as having a less liberal approach to the interpretation of both the validity and the scope of arbitration agreements than did respondents Survey-wide with respect to courts in their own States, they were not described as Strict, but rather as Neutral with respect to both validity and scope. These results, then, are consistent with a picture of a judicial system that is not opposed to arbitration, but simply largely unfamiliar with it.

While Slovenia currently has little recognition within the arbitral world, and arbitration also appears to be underdeveloped within Slovenia, this is likely to be due, to a large extent, to the relatively recent point at which Slovenia updated its arbitration law to reflect modern standards of arbitration regulation. Slovenia's new arbitration law, however, is clearly designed to be strongly supportive of arbitration. Moreover, there are clearly attractive features of Slovenian arbitral practice, and Slovenia's leading arbitral institution, the Ljubljana Arbitration Centre, is very active. Given this background, while Slovenia will undoubtedly take time to grow as a centre for arbitration, strong foundations have been put in place.

Focus

(i) Confusion regarding arbitrability of certain types of disputes

Arbitration in Slovenia is governed by the provisions of the Slovenian Arbitration Act, which entered into force on May 8, 2008. The Act largely incorporated the main provisions of the 1985 version of the UNCITRAL Model Law, including certain amendments to the UNCITRAL Model Law adopted in 2006.

The regulations concerning arbitrability of disputes are contained in Article 4 of the Slovenian Arbitration Act. Generally, all disputes involving an economic interest of the parties may be submitted to arbitration. Moreover, non-economic disputes may be submitted to arbitration if the parties are legally permitted to reach a settlement with respect to them. This provision applies to both domestic and international arbitration, and to both natural and legal persons having their domicile or seat in Slovenia (including the Republic of Slovenia and other public legal entities) (Articles 4(2) and 5 of the Slovenian Arbitration Act).

Restrictions on arbitrability are contained in provisions of Slovenian law other than the Arbitration Act. For example, Article 1053 of the Code of Obligations of October 3, 2001 excludes the arbitrability of matters concerning relationships between natural persons (i.e. issues regarding marriage that the parties may not settle, parental rights, and adoption).¹²⁵

The problem that has arisen is that not all provisions providing for the exclusive jurisdiction of Slovenian courts over certain types of disputes are adequately clear. This is the case, for example, with respect to disputes involving immovable property, as it has not yet been confirmed in case law that all disputes relating to immovable property (such as contractual arrangements or leases) are arbitrable.

A similar concern relates to the recent authentic interpretation of the Law on Commercial Public Services (Official Gazette No. 32/93 with the amendments) adopted by the Slovenian Parliament in 2011, which provides in Article 40 that disputes concerning the performance of concession contracts between concession grantors and concessionaires must be decided

¹²⁵ Vatovec (2012)

by Slovenian courts. Notably, while not finally resolving the matter, in its decision Cpg 2/2014 of 17 June 2014, the Supreme Court of Slovenia held that even if Article 40 of the Law on Commercial Public Services provided for exclusive jurisdiction of the State courts, which it does not, this would not prevent the resolution of disputes arising from a concession contract in domestic arbitration. In addition, legal scholars specialising in Slovenian procedural and arbitration law argue that disputes arising out of concession contracts continue to be arbitrable.

(ii) Enforceability of interim measures ordered by arbitral tribunals

Both the international arbitration practice and most modern arbitration laws (including the UNCITRAL Model Law) allow arbitral tribunals to order interim measures of protection (known also as “conservatory measures”), in accordance with their general competence to decide disputes submitted to arbitration. Moreover, the leading arbitral institutions located in Europe are increasingly incorporating “emergency arbitrator” provisions into their arbitration rules. Under these provision parties in a dispute that has been submitted to arbitration, but for which an arbitral tribunal has not yet been constituted, can apply to the institution to appoint a temporary arbitrator to decide on an application for urgent interim relief.

While Slovenian law is generally supportive of the ability of arbitrators to order interim measures, one important qualification on this power, also shared by the UNCITRAL Model Law should be noted. Under Article 20(1), the Slovenian Arbitration Act empowers arbitral tribunals, upon request of a party, to order any interim measures it believes are appropriate. Before granting such measures, the tribunal must take into account any relevant agreement between the parties (e.g. a provision in the arbitration agreement that interim measures cannot be ordered by the tribunal), and must give the other party to the dispute the chance to present its case against the granting of the measure. If the party against whom the order was made does not comply with the interim order, the other party may apply to the court for the enforcement of such order (Article 20(4) of the Slovenian Arbitration Act).

While this grant of power to arbitral tribunals is broad, in many cases a party will wish to be granted an interim measure without the other party receiving advance notice of the measure’s adoption. This will be the case, for example, where what is sought is a measure preventing the other party from transferring funds or otherwise disposing of assets sought by the requesting party.

Such *ex parte* interim measures are also permissible under the Act, however whereas regular interim measures can be enforced by a Slovenian court, under Article 20(2) of the Act *ex parte* measures cannot be. This qualification derives from the dominant interpretation of the UNCITRAL Model Law, although it is more clearly stated in the Slovenian Arbitration Act.

Nonetheless, while Slovenian law is in this respect consistent with the UNCITRAL Model Law, the importance of the availability of *ex parte* measures to participants in arbitration means that this limitation seriously undercuts the support otherwise provided in the Act for the awarding by arbitral tribunals of interim measures.

(iii) Declaration of enforceability of domestic arbitral awards

Article 41 of the Slovenian Arbitration Act regulates the enforceability of domestic arbitration awards. In accordance with this article, enforcement of a domestic arbitration award requires a declaration from the District Court in Ljubljana that it is enforceable. The

court may refuse to declare the enforceability of a domestic arbitral award if it finds that one of the grounds for setting aside arbitral awards (Article 40(2)) applies.

While these grounds are the same as the provisions in the UNCITRAL Model Law regarding challenges to arbitral awards, an important procedural limitation must be noted. That is, if the award for which enforcement is being sought has already been subjected to an unsuccessful action requesting that the award be set aside, the enforcement court will not take into account any grounds rejected in that previous action.

This provision is a positive addition to the Arbitration Act, as it limits the ability of parties to delay enforcement of arbitral awards by re-arguing issues on which a court has already found against them.

Leading Arbitral Institutions

1. Ljubljana Arbitration Centre at the Chamber of Commerce and Industry of Slovenia (LAC)

Visit: Logistics of the Study precluded a visit to the Court

Questionnaire: No responses received

2.2.28. Spain

Overview

While individual Spanish practitioners have long had a prominent role in international arbitration, Spain itself has traditionally not been a major arbitral centre. This situation, however, began to change with the adoption of Spain's current arbitration law in 2003, and while Spain can still not claim to be one of Europe's primary arbitral centres, it is now the home of both a highly professionalised body of arbitration lawyers and active and professional arbitral institutions.

This being said, it is important to acknowledge that while Spain is arguably one of the most promising developing arbitral States in Europe, it is still clearly in the process of developing, rather than being already developed. In terms of international recognition, for example, when respondents to the Survey of Arbitration Practitioners undertaken as part of this Study were asked to recommend five States as the seat of an international arbitration, only 5.79% of non-Spanish respondents recommended Spain, making Spain the 14th most recommended State out of the 30 States included in this Study.¹²⁶ Moreover, once those States with a regional/cultural connection with Spain (France, Italy, Malta, Portugal) are removed from consideration, only 14 respondents from the remaining twenty-five States recommended Spain. Spain, that is, has clearly not yet developed an international reputation as an arbitral seat.

Reputations, however, take time to develop, and there are clear indications of strong arbitral practice within Spain. As discussed in the Focus section of this chapter, for example, Spanish law and Spanish arbitral institutions place particular emphasis on the speed of arbitration, and while responses from Spanish respondents to the Survey do not provide ground for any conclusion that arbitration in Spain is faster than generally found across the European Union/Switzerland, Spanish respondents do report that both the domestic and the international arbitrations in which they have been involved in the past five years concluded within time periods equivalent to those reported on average by respondents Survey-wide. Similarly, Spanish respondents on average reported final awards in those arbitrations being delivered within approximately the same period of time after the

¹²⁶ Details of the responses provided to the questions in the Survey, both by respondents Survey-wide and specifically by respondents who identified Spain as their State, are included in an Annex to this Study.

conclusion of hearings as did respondents Survey-wide. Moreover, although high rates of applications for annulment often characterise underdeveloped arbitral jurisdictions, Spanish respondents reported rates of annulment applications with respect to awards from both domestic and international arbitrations in which they had been involved in the past five years that were no higher than those reported on average by respondents Survey-wide.

Indeed, even with respect to Spanish courts, despite concerns that are often expressed regarding the slowness of Spanish courts, Spanish respondents reported the enforcement of both domestic and foreign arbitral awards taking approximately the same period of time as was reported on average by respondents Survey-wide. More generally, while Spanish respondents did describe Spanish judges as having a lower understanding of arbitration than was described by respondents Survey-wide with respect to judges in their own States, that understanding was nonetheless described as Adequate. Similarly, while Spanish respondents described Spanish judges as having a slightly less positive attitude to arbitration than did respondents Survey-wide, they were nonetheless described as having an attitude between Neutral and Positive, rather than actually Negative. In this context it should also be noted, as discussed further in the Focus section of this chapter, that a specialised First Instance Court focusing on arbitration has been created in Madrid with exclusive jurisdiction for judicial supervision of and assistance to arbitrations seated in the Judicial District of Madrid. As a result, regardless of the understanding of and views on arbitration of judges in Spain generally, arbitrations seated in Madrid are ensured of having the assistance of a specialised judge with both a developed understanding of arbitrations and a designated role of providing assistance to them.

There are, of course, still problems with Spanish courts, as discussed further in the Focus section of this Study, both with respect to their speed of their proceedings, and with the approaches they at times adopt to the interpretation of arbitration agreements and the legislation applicable to arbitration. However, this is far from unusual for a developing arbitration State, and with continued attempts by arbitral institutions and arbitration specialists to familiarise judges with the realities of arbitration, and with the ongoing efforts of the Spanish Arbitration Club to promote arbitration throughout Spain, there is reason to be optimistic about longer-term improvements in this situation.

Arbitration in Spain, that is, may still be developing, but it has already developed in some respects to a level comparable to international practice. In addition, while Spanish respondents who serve as arbitrators report a slightly lower rate of appointments in arbitrations seated abroad than do respondents Survey-wide, as might be expected from arbitrators in a developing jurisdiction, they also report having been appointed in arbitrations seated in a wide variety of European jurisdictions, including a significant number of appointments seated in France, England and Switzerland, three of Europe's leading sets for international arbitrations. Spain, that is, may not yet be recognised internationally as an arbitral seat, but its leading practitioners are active members of the international arbitration community.

Spain is far from alone in having adopted a new "pro-arbitration" law within the last two decades, and there is no question that some aspects of Spanish arbitration are still in development. However, there is also clear evidence that thanks to a strong body of arbitration professionals and active arbitral institutions, Spain has already developed considerably towards becoming a mainstream arbitral State, even if this does not yet seem to have been recognised by Europe's broader arbitration community.

Focus

(i) Expeditiousness of arbitration proceedings

Arbitration in Spain is designed to be particularly time-effective, due both to legislative controls and to a recognition by Spanish arbitral institutions that speed is one of the primary benefits that arbitration can provide over the slow Spanish court system, as well as being a competitive advantage with respect to foreign arbitral institutions. The current Arbitration Law, adopted in 2003, provides that the final award in any arbitration seated in Spain must be issued within six months of the filing of the statement of defence, or from the expiry of the period to file it. This follows the previous arbitration law, adopted in 1988, which provided for the same time period, but starting from the appointment of the last arbitrator. The possibility to extend this time limit without the agreement of the parties is very limited: the tribunal can only add two more months and must do so by means of a reasoned decision.

For complex arbitrations this schedule would be impossible to meet without compromising on the quality of the proceedings, or enormously increasing the cost to the parties of the arbitration. However, parties are permitted to depart from this rule by mutual agreement before or after the initiation of the proceedings, and can set a mutually acceptable time limit. The parties can also depart from this rule by submitting to arbitration rules that provide for different time limits or that adopt a mechanism to modify those limits.

Importantly, however, the latest amendment of the Arbitration Law, approved in 2011, makes clear that violation of the 6 month time limit does not constitute grounds for having the award set aside, unless the parties have expressly agreed otherwise. Consequently, even where the parties have not specifically agreed to extend the 6 month time period, an award delivered after 6 months will still be enforceable.

Notwithstanding the lack of consequences for violating the 6 month rule, the existence of the rule has had a clear normative effect on arbitration in Spain, by creating an expectation among parties that arbitration will be completed within 6 months of the filing of the statement of defence. As a result, arbitral tribunals seated in Spain tend to comply with the time limit and will usually render their decision within six months of the filing of the statement of defence, where the parties have not agreed to a longer period.

(ii) Creation of a Specialized Arbitration Court in Madrid

In 2010 a specialised First Instance Court focusing on arbitration was created in Madrid (First Instance Court no. 101 of Madrid). This Court has exclusive jurisdiction for judicial supervision of and assistance to arbitrations seated in the Judicial District of Madrid. In particular, this Court has jurisdiction in all matters relating to assistance for the taking of evidence, provisional or interim relief and enforcement of awards. The Court's jurisdiction does not, however, extend to annulment proceedings.

There is an obvious benefit in having such a specialized court, as its expertise in the field of arbitration ensures a uniform and informed approach to arbitration, contributing significantly to the desirability of Madrid as a seat of arbitration. The creation of specialized arbitration courts is an increasing trend in jurisdictions seeking to attract arbitration, including New York and Miami, as the existence of such a Court can have a positive effect on the perception of a jurisdiction as a seat for arbitration, as it guarantees that the court interacting with the arbitration will have both a positive view of arbitration and the necessary expertise to ensure the arbitration functions effectively.

On the other hand, it must also be noted that some important Court proceedings relating to arbitration do not fall within the jurisdiction of this specialized First Instance Court of

Madrid: the most notable example in this regard is the appointment of arbitrators, challenge of awards and recognition of foreign arbitral awards, which fall within the jurisdiction of the Regional Superior Courts of Justice, following the amendment of the Arbitration Law that took place in 2011. In any case, however, the creation of a specialized Court must be regarded as a welcome evolution of the practice of arbitration in Spain.

This being said, however, it must also be remembered that the creation of a specialized arbitration court also creates a risk that understanding of arbitration among judges other than the judge on the specialized court will be limited, as they will have little formal experience of arbitration. This is relevant, firstly, because any civil and commercial judge is competent to decide, in cases before them, on objections to jurisdiction based on the existence of an arbitration agreement. Secondly, the existence of a negative view regarding arbitration within the judicial community can significantly impede efforts to promote legislative improvements, as well as to improve the perception of arbitration more broadly within the legal and business communities. It is important, therefore, that the existence of the court is combined with ongoing efforts by Madrid's arbitral community to increase the understanding of and appreciation for arbitration among judges.

(iii) Excessive formalism in the enforcement of arbitral awards

The Spanish Law on Civil Procedure provides that, in order to enforce an arbitral award, the party desiring enforcement must submit an original copy of the arbitration agreement (Spanish Law on Civil Procedure, Art. 550.1.1). This is similar to the requirement in the New York Convention that parties seeking enforcement of an arbitral award must provide the enforcing court with either the original arbitration agreement or a duly certified copy. However, the absence in the Spanish legislation of a provision allowing the substitution of a certified copy when the original agreement is unavailable, has led some Spanish courts to deny enforcement of domestic awards where the claimant is not capable of producing the original copy of the arbitration agreement. Indeed, this the case even though the Spanish Supreme Court has ruled, in the context of the recognition of a foreign arbitral award under the New York Convention, that this requirement must be considered satisfied when the respondent actively participated in the arbitration proceedings.

While it is clearly important to establish that a party against whom an award is being enforced did indeed consent to have their dispute resolved through arbitration, the requirement that the original agreement be produced, when strictly applied, risks depriving the enforcing party of the dispute resolution procedure for which it negotiated. Such a requirement is excessively formalistic, as it does not differentiate in any way between cases in which there is genuine doubt regarding the existence of an arbitration agreement, and cases in which there is adequate evidence that an arbitration agreement existed, but the original agreement itself is not available, a distinction that has, as noted above, been acknowledged by the Supreme Court with respect to recognition of foreign awards.

A similar formalistic approach is adopted by Spanish courts with respect to the service of any award to be enforced, as some courts have held that enforcement of awards can be denied when there was no proof that the award has been served on the defendant. This rule has been interpreted very strictly by some courts, which have required evidence not only of delivery of the award to the party against whom enforcement is sought, but additional proof that the document delivered did indeed have the same content as the award to be enforced.

The formalism of Spanish courts can act as a significant hurdle for the success of arbitration in Spain, as it places barriers in the way of the successful operation of arbitration that have no rational basis, and achieve no legitimate ends.

Leading Arbitral Institutions

1. Barcelona Arbitration Court (TAB)
Visit: 16 July, 2014
Questionnaire: Responses included in Annex
2. Civil and Mercantile Court of Arbitration (CIMA)
Visit: Logistics of the Study precluded a visit to the Court
Questionnaire: Responses included in Annex
3. Madrid Court of Arbitration (CAM)
Visit: 14 July, 2014
Questionnaire: Responses included in Annex
4. Spanish Court of Arbitration (CEA)
Visit: 14 July, 2014
Questionnaire: Responses included in Annex

1. Barcelona Arbitration Court (TAB)

The Barcelona Arbitration Court (TAB) is a domestic but expanding arbitral institution, with 90% of its caseload composed of domestic arbitrations. While it was partially established in response to concerns arising out of the particularly strong regionalism that characterises Spain, the TAB does not see itself as in any way a partisan institution, and indeed organises an annual meeting of the primary Spanish arbitral institutions. Nonetheless, the TAB's ties to Catalonia's business community strongly informs the TAB's approach to its work.

In addition to its work administering arbitrations, of which the TAB administers around 80 per year, the TAB is also strongly engaged in the development of arbitral awareness, particularly in Catalonia. Most notably, the TAB has entered into agreements with three local universities (ESADE, Pompeu Fabra, International University of Catalonia) to promote the teaching of arbitration, something that remains rare in Spanish universities.

The focus of the TAB on such work is driven by the fact that the level of knowledge and recognition of arbitration as a valid ADR mechanism is still relatively low in Spain. *Ad hoc* arbitration (i.e. non-institutional) dominated in Spain until recently, and was practiced overwhelmingly on an *ex aequo et bono* basis (i.e. decisions based on fairness and equity, rather than law), which damaged the reputation of arbitration as a means of genuinely legal dispute resolution. In addition, arbitration's reputation in Spain has also been damaged by Spain's chaotic market of arbitral institutions, which proliferated after legislative changes in 1988 first allowed arbitral institutions to be formed. There are, for example, currently 22 arbitral institutions in Catalonia alone. This situation damages the perception of arbitration of both lawyers and parties, as it unavoidably raises concerns about the quality of institutional arbitration.

The TAB's connection to the regional business community can also be seen in its approach to expansion as an institution. As with most arbitral institutions, the TAB is seeking to expand its activities internationally, however differently from most other arbitration institutions the TAB believes it should approach that goal not through a detachment from the local business background, but rather from an involvement with foreign investors operating in Spain. The institution, that is, does not aim merely to offer its services in other States, to parties seeking a neutral forum, but has instead focused on France and the United States as likely targets for future expansion, on the ground that Spain attracts a considerable amount of French and US investment. This suggests a commitment on the part of the TAB to grow its activities in an organic way, extending beyond Catalonia, but

while maintaining a connection with the Catalanian and the broader Spanish business and arbitration communities.

The TAB maintains a database of prospective arbitrators, to which any individual can add themselves if they meet the specified formal requirements. When the TAB is required to appoint an arbitrator, a committee of ten people will select three names from the TAB's database and propose these names to the parties. If the parties do not agree on an arbitrator, either from the list presented by the TAB or independently, the TAB will select the arbitrator itself. Notably, although the TAB has a strong focus on developing arbitration in Spain, the TAB will not itself appoint anyone who does not have at least 15 years of experience in their profession, thereby effectively precluding all but senior practitioners. Since the majority of Spanish arbitrators get their first appointment from an arbitral institution, such a rigid limitation does not seem to be consistent with the TAB's goal of developing arbitration in Spain.

The TAB's approach to the administration of arbitrations emphasises the ability of an institution to ensure the efficiency of an arbitration. However, the institution does not send representatives into arbitral hearings, and only undertakes formal scrutiny of awards, in order to ensure enforceability. While such an approach is common in arbitration, and there are indications that Spanish courts might regard negatively too active a role of an institution in the arbitrations it administers, a higher degree of supervision in the conduct of hearings and a more engaged award review process would make it possible to remove the TAB's current experience requirement for the appointment of arbitrators, while also providing enhanced reassurance to parties only familiar with the uncertainties that can characterise *ad hoc* arbitration.

2. Madrid Court of Arbitration (CAM)

As is the case with all Spanish arbitral institutions, the Madrid Court of Arbitration (CAM) is relatively new, as Spanish law only allowed the creation of such bodies for the first time in 1988. Following this reform, a high number of institutions have been created, either privately or under the auspices of a Chamber of Commerce, however only few of them administer a substantial number of proceedings. While no single institution has yet achieved a predominant position in the Spanish arbitration market, in recent years CAM has achieved a clear place as the leading institution in the Spain.

In conscious response to the slowness of Spanish courts, CAM emphasises the speed and efficiency of arbitration, closely monitoring the proceedings it administers. Indeed, while CAM will not mandate a schedule for an arbitration, if the schedule adopted by a tribunal appears to CAM to be excessively slow, they will contact the tribunal, encouraging them, for example, to consult directly with the parties about the schedule. Arbitrators are also obligated by CAM's arbitration rules to sign a declaration of availability prior to appointment, as assurance that they are indeed able to perform their work in a timely manner. A representative from CAM is sometimes involved in procedural meetings, but this is not a requirement. CAM appears to be successful in its efforts to ensure efficiency, as 75% of its cases are resolved in less than twelve months, with 25% concluding in under six months.

In a reflection of the relative underdevelopment of arbitration in Spain, although CAM may be Spain's leading arbitration institution, international arbitrations only constitute 30% of its caseload. This is, however, a significantly greater proportion than that of any other leading Spanish arbitral institution, and it is an area that CAM is specifically attempting to develop, with a particular focus on the ability of a Spanish arbitral institution to act as a neutral institution in disputes between Latin American and non-Spanish European parties.

CAM regularly appoints arbitrators, and does so from a managed list of approximately 300 individuals, both Spanish and foreign, although it will appoint individuals not on the list when appropriate. While the size of the list has tripled in the past eight years, membership of the list remains tightly controlled by CAM, and there is currently a waiting list of individuals wishing to be added, which CAM maintains on the rationale that to be usable as a source of appointments the list must be limited in size. In addition, a limited list also allows CAM to ensure that arbitrators on the list get regular work, and can thus gain experience. It should be recognised, however, that such a restrictive approach also limits the accessibility of appointments, a serious consideration given the underdevelopment of arbitration in Spain, particularly as inexperienced arbitrators are extremely unlikely to be appointed in *ad hoc* proceedings, so rely on institutional appointments as a means of gaining experience. That being said, CAM does see itself as having a responsibility for assisting in the development of arbitration in Spain, and does attempt to appoint young arbitrators and female arbitrators where they would be appropriate for a case. Indeed, CAM has provided the first appointment as arbitrator to eighty individuals in the past five years alone.

CAM is active in networking with arbitral institutions in Latin America (particularly Peru, Brazil and Mexico), and in other European States (particularly Germany and Austria), and is also an active participant at the international level, where it holds Observer status before the United Nations Commission on International Trade Law (UNCITRAL) with respect to two working groups. It also actively engages with other Spanish arbitral institutions, as well as conducting activities of its own outside Madrid. However, while collaboration does occur between Spain's leading arbitral institutions, it remains limited, the most likely explanation being found in the competition that developed between Spanish institutions after 1988, when many new institutions entered the market in a short period of time. Nonetheless, CAM has at this point succeeded in affirming itself as arguably the leading institution in Spain, with few serious competitors, and while Spanish arbitration might benefit at the international level from the prominence of a single institution, it is far from clear that dominance in the domestic marketplace of a single institution is likely to be the most successful approach for the development of arbitration in Spain.

That is, the very regionalised nature of Spain as a country unavoidably creates a risk that any single dominant institution, no matter its quality, will be perceived as effectively "foreign" by significant parts of the country. As a result, while CAM does not see itself as a particularly Madrid-focused institution, and in particular seems primarily intent on securing a place at the international level, it is likely to remain viewed as a Madrid institution by those not closely familiar with its activities. Closer collaboration with other institutions located in other parts of Spain might, then, be the most effective way of disseminating an arbitration culture throughout Spain, even if CAM attempts to ensure for itself the leading role at the international level.

3. Spanish Court of Arbitration (CEA)

The Spanish Court of Arbitration (CEA) is Spain's oldest arbitral institution, having been established by Royal Decree in 1981, nearly a decade before Spain's 1988 arbitration law allowed the establishment of competing institutions. Although originally established to administer international arbitrations, the CEA remains a predominantly domestic institution, with 80% of its caseload consisting of domestic arbitrations. Although this domestic focus is characteristic of Spanish arbitral institutions, one explanation for the continued predominance of domestic cases at the CEA, despite the original motivation for the CEA's founding, is that the CEA is also the preferred institution for arbitrations involving Spanish governmental entities, and is specifically referenced in some Spanish government-approved model contracts. International disputes, however, are far more likely to involve two private

parties than they are a governmental entity. In addition, in a reflection of the regionalised nature of contemporary Spain, the perceived “national” nature of the CEA has also granted it a strong place for the administration of disputes involving parties from different Spanish regions.

The CEA maintains a list of arbitrators including about 350 names, although it can also appoint arbitrators not on its list. As most of the arbitrations administered by the CEA involving a sole arbitrator, party agreement on the arbitrator is uncommon, and the CEA appoints the arbitrator in approximately 80% of the arbitrations it administers. While formally the CEA expects potential arbitrators to have worked as a lawyer for more than 10 years, in practice it is rare that they appoint arbitrators under 40 years of age, as parties express a preference for more experienced individuals. When appointing arbitrators, the CEA initially provides the parties with a list of 3 to 5 names. If the parties cannot agree on a candidate from that list, the CEA will make the appointment itself.

Arguably the most distinctive aspect of the CEA’s approach to the administration of arbitrations is the approach it has taken to ensuring the speed of arbitrations that occur under its auspices. This emphasis on speed is a common one amongst the primary Spanish arbitral institutions, as speed is seen as a primary attraction of arbitration, given the slowness of Spanish courts. While other institutions approach this problem in what might be called a “soft law” manner, maintaining contact with tribunals and intervening to encourage efficiency, the CEA has formalised its commitment to the speed of arbitration in the form of a rule requiring that final awards in all arbitrations administered by the CEA must be delivered within five months of the filing of the Answer to the Claim, with the possibility of a single one month extension. While the CEA reports that approximately 70% of arbitrators do indeed deliver their award within this time limit, it must be emphasised that failure to do so does not affect the enforceability of the award. Rather, it merely impacts upon the perception of the parties, and on the likelihood that the CEA will appoint the arbitrator in question in the future. This is, however, a significant concern, as the CEA appoints the arbitrator in approximately 80% of the arbitrations it administers.

It should initially be emphasised that the five month period begins with the filing of the Answer by the Respondent in the arbitration, not with the filing of the request for arbitration by the Claimant, or with the appointment of the arbitrator or tribunal. Consequently, while five months is rapid for an arbitration, and extremely rapid for an international arbitration, the five month period does not commence until both parties have already had the opportunity to do some significant substantive work on the dispute. Nonetheless, it remains a tight schedule, although one that many parties may find attractive.

One question that might be raised, however, is whether the CEA’s “hard law” approach to ensuring the speediness of arbitration is ideally designed to achieve its goals. In many cases five months will suffice, and in these cases the existence of such a hard rule can help avoid delays caused solely by the busy schedules of arbitrators and attorneys. For more complex cases, however, and arguably for most international cases (due to the logistics involved in a transnational arbitration), a five month time limit may be difficult to meet. Moreover, not all delays arise from the parties, and no matter how attentive the Court may attempt to be, a rigid time limit unavoidably raises a risk that administrative delays on the part of the Court will use up some of the limited time that arbitrators have.

Failure to meet the time limit, of course, does not render the resulting award unenforceable, but arbitrators can be expected to be aware that failure to meet the five month limit will damage their reputation with both the parties and the institution. There is the risk, then, particularly for less prominent arbitrators, for whom even minor reputational damage can seriously impact future appointments, that arbitrators will feel pressured to

take shortcuts, or simply spend less time on their decision and award than they would at another institution. As a result, the quality of the arbitration will suffer.

There is no evidence that a negative impact of this type is occurring, and indeed the CEA has the lowest ratio of annulled awards amongst all Spanish institutions. Moreover, the CEA emphasizes that parties may extend the time limit, and that rather than simply imposing a time limit, the CEA actively works with arbitrators to arrange an efficient schedule. Moreover, while arbitrators may be concerned about the potential impact on future appointments by the CEA if they fail to meet the time limit, arbitrators are similarly unlikely to be reappointed if they deliver a low quality award.

However, the rule is new, having been adopted only in 2011, so its potential longer-term impacts are not yet clear. Nonetheless, it is a distinctive approach to addressing the concern widely expressed by parties that arbitration is often too slow, and if it succeeds in encouraging the speedy resolution of disputes without affecting the quality of awards, it will clearly constitute an attractive feature of CEA arbitration.

2.2.29. Sweden

Overview

Sweden is one of the world's most developed arbitral jurisdictions, both in terms of the levels of arbitration reported to occur in Sweden, and in terms of the recognised expertise of the leading members of the Swedish arbitral community. Indeed, the level of acceptance of arbitration in Sweden is indicated well by the fact that not only has the Swedish government appointed a committee of arbitration experts to advise it on proposed changes to Sweden's arbitration law, but when the Svea Court of Appeal, seated in Stockholm, wished to develop guidelines to improve their handling of challenges to arbitration awards, they did so in active consultation with leading Swedish arbitration practitioners and the Arbitration Institute of the Stockholm Chamber of Commerce, Sweden's leading arbitral institution.

In reflection of the degree to which arbitration has been incorporated into Swedish business and legal practice, when Swedish respondents to the Survey of Arbitration Practitioners undertaken as part of this Study were asked to estimate the proportion of domestic commercial contracts and international commercial contracts entered into in Sweden in the past five years that included an arbitration agreement, they produced considerably higher estimates with regard to both types of contract than did on average respondents Survey-wide with respect to their own States.¹²⁷ Estimates of this nature cannot, of course, serve as accurate guides to the actual number of arbitration agreements included in contracts in a State, but they provide important information on the experience of arbitration professionals regarding the degree to which arbitration has been incorporated into a State's business practices. In further support of this conception of the high integration of arbitration into Swedish dispute resolution practice, Swedish respondents also described Swedish business people as having both a substantially greater understanding of arbitration and a more positive attitude towards arbitration than did respondents Survey-wide with respect to business people in their own States.

As with the other three leading arbitral seats in the European Union/Switzerland (France, Switzerland, and England, Wales and Northern Ireland), Sweden's arbitration law is not based on the UNCITRAL Model Law. Even though in such jurisdictions the UNCITRAL Model Law is generally taken as providing a foundation for discussions when new arbitration laws

¹²⁷ Details of the responses provided to the questions in the Survey, both by respondents Survey-wide and specifically by respondents who identified Sweden as their State, are included in an Annex to this Study.

are to be developed, and particular efforts were made in Sweden to ensure that no provision of the new Swedish law would be inconsistent with the Model Law, the level of experience with arbitration on the part of practitioners and judges in such States allows them to develop laws seen as more appropriate to their particular national characteristics than can possibly be reflected in a generalised model such as the Model Law. Indeed, in what is arguably confirmation of the validity of that judgement in Sweden's case, Swedish respondents expressed strongly positive views of Sweden's arbitration law, describing it as Very Supportive of arbitration, and as more supportive than did respondents Survey-wide with respect to their own national laws. In fact, no Swedish respondent described Swedish law as less than Supportive of arbitration.

While there is little question of the prominence of Sweden as an arbitral seat, there is some evidence suggesting that other than the very top members of Sweden's arbitral community, who have unquestionably transnational practices, Swedish arbitration specialists may have less international practices than is the case in other leading jurisdictions. While Swedish respondents, for example, on average reported that international commercial arbitration constitutes a similar proportion of their arbitration work as did respondents Survey-wide, they also report that domestic commercial arbitration constitutes a larger proportion of their practice than did respondents Survey-wide. This is undoubtedly at least in part a reflection of the apparently high rate of acceptance of arbitration in Sweden, as discussed above. However, Swedish respondents who serve as arbitrators also reported a smaller proportion of their appointments as arbitrator over the past five years being in arbitrations seated in other States than did respondents Survey-wide who serve as arbitrators. In addition, they reported being appointed in arbitrations seated in a relatively narrow range of States, with the neighbouring States of Denmark and Finland being the most common seats other than Sweden itself. Importantly, as 91.43% of Swedish respondents who serve as arbitrators reported having performed that role in English, the most common language for an international arbitration, this does not appear to be a matter of mere language limitations.

There is no question, then, that Sweden has established itself as one of the world's leading arbitral seats, as well as more broadly being in many ways a model for the effective integration of arbitration into a domestic economy and legal system. There is, however, evidence to suggest that Swedish arbitration, as a profession, has been less effective in convincing parties throughout Europe and the world of the depth of its expertise, beyond select leading individuals, than is the case with the other leading arbitration jurisdictions in Europe.

Focus

(i) Future reform of court proceedings concerning challenges of arbitration awards: language of the proceedings

Sweden is widely viewed as one of the most desirable seats for international commercial arbitration, with the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) playing a major role in this regard. Within this context of the depth of experience in arbitration that this has generated within the Swedish legal community, and the overall arbitration-friendly attitude of the Swedish legal system, recent discussions have been undertaken about possible reforms regarding the procedures under Swedish law for the setting aside of arbitration awards. A committee of experts has been appointed by the government to provide guidance on this topic and other areas of Swedish arbitration law.

One proposal under discussion has been to allow setting aside proceedings before Swedish State courts to be conducted in English. This is based on the premise that one of the key advantages of arbitration is that it allows the parties to a dispute to the language of their

proceedings: this way, parties from different legal systems can rely on a culturally impartial and equally accessible system of adjudication. Consequently, even if parties in an arbitration, or their lawyers, are not familiar with the official national language(s) of the seat of the arbitration, they can still seat their arbitration in that State, because of its favourable legal structure or other characteristics, while conducting the arbitral proceedings themselves in any language they prefer.

The difficulty is that if the award is subsequently challenged in the courts of the seat, this linguistic flexibility is often lost, as the setting aside proceedings are usually conducted in the official language(s) of the seat. As Swedish is not a common first or second language outside Sweden, the use of Swedish in setting aside proceedings can create obstacles for foreign parties and their counsels when a challenge is brought in Swedish courts against an award from an arbitration seated in Sweden. Allowing setting aside procedures to be conducted in English could, therefore, have a significant effect on the desirability of Sweden as an arbitral seat, as it increase significantly the likelihood that setting aside proceedings in Swedish courts would be undertaken in a language accessible to foreign parties and/or their foreign counsel.

Of course, such a rule would also impose a significant requirement on Swedish judges, who would be required to have a high enough command of English to allow technical legal proceedings to occur in English. However, as setting aside proceedings under Swedish law must be brought at one of the six Courts of Appeal, rather at the level of district courts, the impact of this requirement would be muted, while the rule itself would significantly improve the appeal of Sweden as a seat for arbitrations involving foreign parties.

(ii) Future reform of court proceedings concerning challenges of arbitration awards: grounds for setting aside of awards

A second reform currently being discussed in Sweden regards the grounds on which an award can be set aside. At the moment Sweden deviates from the standards included in the UNCITRAL Model Law, and differentiates between two different types of cases in which an award can be challenged.

Pursuant to Section 33 of the Swedish Arbitration Act, an award can be set aside as void, with no deadline applicable for the bringing of the challenge. This means that the award rules on non-arbitrable issues, runs contrary to Swedish public policy, or does not fulfil the requirements of written form and signature. In addition to this, Section 34 sets forth a list of cases of irregularity, under which the award can also be set aside, if an action is brought within three months of the award being issued: these include several procedural reasons, such as where an arbitrator has been appointed contrary to the agreement between the parties or the law, or where the claims addressed in the arbitration are not covered by a valid arbitration agreement between the parties.

Although the Court of Appeal has jurisdiction on both types of challenge, there is one significant difference: where none of the parties is domiciled or has its place of business in Sweden, it is possible to exclude or limit the application of the grounds for setting aside an award as are set forth in Section 34 (but not Section 33) by means of an express written agreement.

Current discussions on the reform of the Swedish arbitration law in this area are focused on this existence of two different types of challenge, and whether there is indeed adequate reason to maintain such an evident departure from the widely accepted standards included in the UNCITRAL Model Law.

(iii) Challenge against decisions relating to arbitrators' fees

In the Swedish system it is possible to challenge any decision relating to the costs of arbitral proceedings, including the fees of arbitrators, before State courts. With respect to arbitrators' fees, this possibility exists even if the arbitrators were paid in accordance with a schedule fixed in advance by an arbitral institution, as made clear in 2008 by the Swedish Supreme Court in the *Soyak* case.¹²⁸

The basis of this rule is Section 37 of the Swedish Arbitration Act, which states that arbitrators' fees must be reasonable, however the application of this rule in the context of institutional arbitration creates an unfortunate opportunity for parties to question the reasonability of arbitrators' fees even though they have previously agreed to those fees by selecting the arbitral institution in question. That is, while in *ad hoc* arbitration it may not be possible to quantify arbitrators' fees before the proceedings have ended, in administered arbitration it is generally possible to predict accurately the extent of such fees, as the rules of arbitral institutions will usually provide for standard tariffs, based either on the amount in dispute between the parties or the time spent by the arbitrators. As a result, by retaining the right to review the reasonability of arbitrators' fees in institutional arbitration, Swedish courts have reserved for themselves the right to overrule the view of the parties regarding the fees to be paid in the parties' own proceeding. More troublingly, this review occurs post hoc, after the arbitrators have undertaken the work in question in accordance with the terms on which they were hired.

There might, of course, be situations in which a review of the fees charged in an institutional arbitration might be appropriate, such as where there are questions about the legitimacy of the institution in question, or regarding the ability of one of the parties to participate meaningfully in the selection of the institution because of a significantly inferior bargaining position. Similarly, review might be appropriate when an institution's arbitration rules have changed in the time between the conclusion of the arbitration agreement and the start of the proceedings: in this hypothesis, parties could argue that the new tariffs set forth and applied by the institution are not "reasonable". However, absent such exceptional situations, it is clear that the parties are more appropriate judges than reviewing courts of the value of their own dispute, and consequently of the amount they are willing to pay to secure high quality arbitrators.

Leading Arbitral Institutions

1. Arbitration Institute of the Stockholm Chamber of Commerce (SCC)

Visit: 30 July, 2014

Questionnaire: Responses included in Annex

1. Arbitration Institute of the Stockholm Chamber of Commerce (SCC)

The Arbitration Institute of the Stockholm Chamber of Commerce (SCC) is a well-established arbitral institution that is currently balanced between serving as a dominant regional institution, and achieving its goal of becoming a truly transnational institution, similar to the ICC International Court of Arbitration (ICC). The caseload of the SCC is distinctive in this respect, as although approximately half of its caseload is composed of domestic Swedish arbitrations, the SCC administers roughly 5 investor-State arbitrations per year, making it arguably the leading generalist international arbitration institution in that field, after specialised institutions such as the International Centre for Settlement of Investment disputes (ICSID) and the Permanent Court of Arbitration (PCA). Notably, however, the SCC's prominence in this field originally arose from its regional prominence,

¹²⁸ *Soyak International Construction and Investment Inc. v. Hober, Kraus and Melis*, Case no. 4227-06, 3 December 2008.

and it is still the case that most investment arbitrations administered by the SCC involve a Western investor and an Eastern European State or Russia.

A similarly split identity characterises the SCC's interactions with other arbitral institutions. On the one hand, the SCC's international prominence can be seen in its active connections with ICSID and the China International Economic and Trade Arbitration Commission (CIETAC), both prominent international institutions. On the other hand, the connections with ICSID are based on the SCC's prominence in investment arbitration, which in turn was built on its regional prominence. Similarly, its connections with CIETAC are built on its longstanding position as the leading institution for arbitrations between Western parties and those from Russia and Eastern Europe. In turn, the SCC, together with the Chamber of Arbitration of Milan, the Vienna International Arbitral Centre (VIAC), and the German Institution of Arbitration (DIS), is involved in a regular collaboration between four of Europe's leading arbitral institutions. The idea behind this collaboration, however, is that these institutions share substantial similarities in size and case composition, and so can benefit from working together in discussions and in the presentation of. The other three members of the group, however, while clearly leading European institutions, are nonetheless also clearly regional institutions, rather than predominantly international institutions such as the ICC. The involvement of the SCC in this collaboration, then, indicates the quality and recognition of the SCC, but also indicates that the SCC is still only in the process of becoming one of the few genuinely international institutions.

In terms of case administration, the SCC adopts a strongly "hands off" approach. A legal counsel is assigned to each case, however the parties and the arbitral tribunal are left free to agree on the procedural development of the arbitration. While the counsel appointed by the SCC will perform scrutiny on awards delivered by the tribunal, this scrutiny focuses solely on formal enforceability, and does not address the substance of the award. In terms of procedure, and as a reflection of the willingness of the SCC to lead the field, the SCC was the first institution in the world to offer an emergency arbitrator procedure, for disputes in which some form of decision is required by an arbitrator early in proceedings before arbitrators have been appointed. This innovation has since been adopted by many other institutions, including the ICC.

The SCC does not maintain a list of arbitrators. When the SCC is required to appoint an arbitrator, as is often the case for the Chair of a tribunal, the counsel in charge of the case will research potential candidates. These candidates will then be discussed by the Secretariat, who will agree on at least three individuals to be presented to the SCC's Board. The Board then makes the final selection, although it remains free to select individuals other than those proposed by the Secretariat.

The SCC is clearly one of the most respected arbitral institutions in Europe, and indeed when the Svea Court of Appeal, seated in Stockholm, wished to develop guidelines to improve their handling of challenges to arbitration awards, they did so in consultation with both leading Swedish arbitration practitioners and the SCC. However, while the SCC is primarily responsible for the prominence of Sweden within contemporary international arbitration, the domestic status of arbitration in Sweden arguably reflects the complexities that can arise when a State's primary arbitral institution achieves the status that the SCC has achieved. Despite the presence within Sweden of one of Europe's, and arguably the world's, leading arbitral institutions, for example, anecdotal reports are that a significant number of *ad hoc* arbitrations take place in Sweden. This clearly reflects the presence in Sweden of a vibrant arbitration culture, undoubtedly reflecting in turn the prominence of the SCC, however it may also indicate a view within Sweden that the SCC is simply not appropriate for many arbitrations.

It is difficult to be clear why this situation exists, and the SCC is unquestionably attempting to engage with all levels of arbitration, as can be seen, for example, in both its adoption of the Rules for Expedited Arbitrations, and its creation of the Swedish Arbitration Portal. However, it may simply be a reflection of the reality that no single institution can be appropriate for all types of arbitration. If this is indeed the situation, then this disconnection between the SCC and certain elements of arbitration in Sweden is likely to increase as the SCC becomes an increasingly international institution, much as the ICC is no longer significantly connected to France, despite remaining formally located in Paris. Unlike in France, however, the SCC's dominance in Sweden has thus far precluded the emergence of any alternative Swedish arbitral institution.

2.2.30. Switzerland

Overview

Switzerland is without question one of the world's leading international arbitration jurisdictions. Indeed, when respondents to the Survey of Arbitration Practitioners undertaken as part of this Study were asked to recommend five States as the seat of an international arbitration, 85.62% of respondents Survey-wide recommended Switzerland, more than any other State included in the Study, and indeed 13.60% more than the next most recommended State.¹²⁹

As this strength might indicate, Switzerland has a highly professionalised group of arbitration practitioners, and indeed Swiss respondents to the survey reported arbitration constituting a significantly higher proportion of their work than did respondents Survey-wide. In addition, Swiss respondents also reported international commercial arbitration constituting a larger proportion of their arbitration work than did respondents Survey-wide.

The mere presence of experienced professionals, however, is clearly not enough to explain the success of Switzerland in international arbitration, and Swiss respondents are notably positive about the institutional context in which Swiss arbitration takes place. As is the case with the three other leading arbitral States in Europe, for example, Switzerland has not based its arbitration law on the UNCITRAL Model Law, even though it resembles that law in most respects. Rather, the Swiss arbitral and legal communities felt that they had enough experience of and expertise in arbitration to enable them to draft their own arbitration law. In arguable confirmation of this judgement, Swiss respondents are overwhelmingly positive about the Swiss law applicable to arbitration, on average describing it as considerably more supportive of arbitration than did on average respondents Survey-wide with respect to their own national laws. In addition, Swiss respondents also described Swiss legislators as having both a higher understanding of arbitration and a more positive attitude towards arbitration than did respondents Survey-wide with respect to legislators in their own States.

Swiss respondents also described Swiss courts as being more liberal with respect to both the validity and the scope of arbitration agreements than did respondents Survey-wide with respect to the courts of their own States. More broadly, Swiss respondents described Swiss judges as having both a higher understanding of arbitration and a more positive attitude towards arbitration than did respondents Survey-wide with respect to judges in their own States.

It is perhaps unsurprising, then, that 100% of Swiss respondents included Switzerland as one of the five States they would recommend as the seat of an international arbitration.

¹²⁹ Details of the responses provided to the questions in the Survey, both by respondents Survey-wide and specifically by respondents who identified Switzerland as their State, are included in an Annex to this Study.

Nonetheless, while Switzerland is clearly a success with respect to international arbitrations, domestic arbitration appears to be less successful. Indeed, even though Swiss respondents described Swiss business people as having both a higher understanding of arbitration and a more positive attitude toward arbitration than did respondents Survey-wide with respect to business people in their own States, they also reported that domestic commercial arbitration constituted a smaller proportion of their arbitration work than did respondents Survey-wide. Moreover, when asked to estimate the proportion of domestic commercial contracts entered into in Switzerland over the past five years that contained an arbitration agreement, Swiss respondents produced lower estimates than did respondents Survey-wide with respect to their own States. Estimates of this nature cannot, of course, serve as accurate guides to the actual number of arbitration agreements included in contracts in a State, but they provide important information on the experience of arbitration professionals regarding the degree to which arbitration has been incorporated into a State's business practices. In line with these other results, when asked to evaluate the importance of certain features of a contract with respect to whether the contract should include an arbitration agreement, Swiss respondents not only regarded the fact that the transaction was domestic as a less important reason for including an arbitration agreement than did respondents Survey-wide, but in fact regarded it somewhat negatively, describing it on average as between Neutral and Some Reason to Avoid Arbitration.

One explanation for these results regarding domestic arbitration in Switzerland is the high regard in which Swiss courts are clearly held, as domestic Swiss parties may simply see no particular benefit to be gained from arbitration. Indeed, when asked to compare the cost and the speed of arbitrating a dispute in Switzerland compared to the cost and speed of litigating the same dispute in Swiss courts, Swiss respondents described arbitration as only Slightly Faster than litigation, but also as only Slightly More Expensive than litigation. With the need for international enforcement removed, then, along with similar benefits of particular importance for a transnational dispute, Swiss parties may simply see the benefits from the increased speed of arbitration as not being sufficient to justify the increased cost.

There are, however, indications that the difficulties with domestic arbitration in Switzerland might run somewhat deeper, as although Swiss respondents on average reported that the international arbitrations in which they had been involved in the past five years took roughly equivalent amounts of time as did respondents Survey-wide, they reported that the domestic arbitrations in which they had been involved in the past five years took longer than did respondents Survey-wide. Similarly, while Swiss respondents reported the awards in the international arbitrations in which they had been involved in the past five years being delivered slightly longer after the hearings than did respondents Survey-wide, they reported the awards in the domestic arbitrations in which they had been involved in the past five years being delivered notably more slowly than did respondents Survey-wide. There are indications, that is, that domestic arbitration in Switzerland, while hardly dysfunctional, may simply be less effective than international arbitration in Switzerland.

There is no question about the prominence of Switzerland as a seat for international arbitrations. Moreover, there is substantial evidence that international arbitration in Switzerland works highly effectively, and is supported by a highly-regarded body of arbitration professionals. There are also indications, however, that the Swiss emphasis on its role as a leading international arbitration seat, and the dominance within Swiss arbitration of professionals with strongly international practices, might be leaving domestic arbitration in Switzerland both less developed than international arbitration in Switzerland, and less effective than it.

Focus

(i) Different Legal Regimes for International and Domestic Arbitration

Switzerland adopts two separate and independent legal regimes: one set of rules governs international arbitration, whilst the other one regulates domestic cases. In particular, international arbitration is governed by Chapter 12 of the Swiss Private International Law Statute ("SPIL", Articles 176 to 194), whilst domestic arbitration is governed by part 3. of the Code of Civil Procedure ("CPC", Articles 353 to 399).

Unlike other jurisdictions, in the Swiss system the difference between domestic and international arbitration is not based on the nature of the underlying legal relationship between the parties, but on the domicile or habitual residence of the parties at the time of the conclusion of the arbitration agreement. Pursuant to Article 176(1) SPIL, the provisions on international arbitration apply to all arbitral proceedings seated in Switzerland, provided that, at the time of the conclusion of the arbitration agreement, at least one of the parties had neither its domicile nor its habitual residence in Switzerland. On the contrary, where the arbitration is seated in Switzerland and none of the parties have their domicile or habitual residence outside of Switzerland, the regime set forth in the Code of Civil Procedure applies.

It must be noted that parties to an international arbitration are free to opt out of the SPIL regime and provide for the application of the domestic rules. Similarly, parties to a domestic case can opt out of the Code of civil Procedure regime and agree on the application of the international arbitration provisions.

The distinction between domestic and international arbitration entails some fundamental consequences. For example, in an international arbitration, parties have the possibility to waive their right to request the setting aside of the award under Article 192(1) SPIL, by an express statement in the arbitration agreement or by a subsequent written agreement. Parties can waive their right to challenge the award in its entirety, or can limit this possibility exclusively to one or several of the grounds listed in Article 190(2) SPIL. However, it should be emphasized that if at least one of the parties has its domicile, its habitual residence or a business establishment in Switzerland, the right to challenge the award on the grounds set forth by the law cannot be waived or limited by agreement of the parties.

(ii) "One Stop" Judicial Review of the Award

Switzerland is often selected as an arbitral seat because of its arbitration-friendly provisions: the Swiss system favours the validity of arbitration agreements and the principle of party autonomy in many respects. A particularly important feature of the Swiss system is the finality of arbitral award: the possibility to set aside arbitral decisions is restricted to limited grounds and parties can waive their right of challenge. In addition to that, Swiss case-law tends to preserve the validity of arbitral awards to a large extent: according to statistics, the chances of success of an action for setting aside the award in an international arbitration are less than 10%.

The system of judicial review of arbitral award contributes to the efficiency of the system. In case an arbitral award is challenged, the action is not governed by the commonly applicable rules of civil procedure, but follows a special procedure, according to which the Swiss Federal Tribunal (Switzerland's supreme judicial authority) has exclusive competence on setting aside proceedings, both in international (Article 191 SPIL) and in domestic arbitration (Article 389 Code of Civil Procedure). This mechanism enhances efficiency, as the average duration of setting aside proceedings before the Swiss Federal Tribunal is approximately five months and no other recourses are possible. As a result, setting aside

proceedings cannot be subsequently brought before different State courts by the losing party in order to delay the finality of the award: in light of this, the Swiss “one stop” system of judicial review has the positive effect of discouraging dilatory tactics.

(iii) Sport Arbitration

Switzerland is also a popular seat for some specific types of arbitration, such as sports arbitration. Sports arbitration has become a fundamental aspect of sports law: especially when accusations of doping are involved, disputes with athletes are settled through a specialized arbitration, managed by the Court of Arbitration for Sport (CAS). Since CAS has its seat in Lausanne, all sport arbitrations conducted under the auspices of CAS are governed by Swiss arbitration law (either Chapter 12 SPIL or part 3. CPC). In principle, sports arbitration is conducted according to the same procedural rules as any arbitration on civil or commercial matters. However, some peculiarities stem from the particular structure of the underlying legal relationship: unlike other types of arbitration, where parties voluntarily decide to submit to the jurisdiction of an arbitral tribunal, athletes have a very limited possibility to choose whether to resort to sports arbitration, since submitting to the authority of the CAS is indispensable in order to be part of the federation and, therefore, to practice the sport. In light of this, there is generally no particular need for coercive enforcement of awards, as athletes generally comply with the arbitral decision voluntarily in order to be able to take part in future competitions.

In light of this, the Swiss Federal Tribunal has introduced some adaptations to the standard regime of arbitration. In particular, according to the *Cañas* decision (4P.172/2006), a waiver of the right to set aside the award is not binding upon the athlete, when consent to such waiver was given in a “forced manner”. Therefore, when signing the waiver is the only way for an athlete to access sport competitions, such waiver must be considered invalid, and it will be possible to challenge the award.

Leading Arbitral Institutions

1. Swiss Chambers' Arbitration Institution

Visit: 18 July, 2014

Questionnaire: Responses included in Annex

1. Swiss Chambers' Arbitration Institution

Compared to the centralisation characteristic of most arbitration institutions, administered arbitration in Switzerland is perhaps more accurately characterised as a form of cooperation, with different functions being performed by different bodies. The success of Swiss arbitration on the international level, however, makes clear that however unusual such a structure might be, it is one that overwhelmingly functions effectively.

The work of administering and developing arbitration in Switzerland is managed by a combination of the Arbitration Court of the Swiss Chambers Arbitration Institution, the Secretariat of the Institution, the founding bodies of the Institution, and the Swiss Arbitration Association. The latter is an independent organisation, but undertakes work often handled in other States by arbitral institutions themselves. Each of these bodies operates with a significant degree of autonomy, but in a complementary fashion, each covering a particular aspect of arbitration, but without any over-arching authority actively coordinating their activities. The Court is the lead body within the Institution, in charge of developing rules, appointing arbitrators, and undertaking similar higher-level activities. The individual Secretariats handle the actual administration of proceedings, acting on behalf of the Court, with each Secretariat administering the arbitrations seated in its geographic location. The Chambers will also undertake marketing efforts to promote arbitration

domestically, and the Institution will undertake marketing efforts to promote the Institution internationally. In both cases a member of the Court may be involved. Finally, the Swiss Arbitration Association, while formally an independent organisation, is recognised as having primary responsibility for the arbitration education and development, including organisation of conferences, publication, and the formation of local interest groups and a group for junior practitioners (ASA Below 40). In addition, representatives of the Association will attend international conferences, to promote the use of Switzerland as an arbitral seat.

The coordination of these activities is significantly assisted by the relatively small and cohesive nature of the Swiss arbitral community, which also plays a role in the practicalities of the administration of arbitrations held under the auspices of the Institution. This comes out most clearly in the process for the appointment of arbitrators, which the Institution is regularly required to do. While the Association provides a publicly accessible list of arbitrators on its website, the Institution has no list and relies instead on the knowledge of members of the Court of the arbitral community. The members of the Court are well connected with both the Swiss arbitral community and the international arbitral community, so are well positioned to identify appropriate candidates, however such a process unavoidably limits access to appointments in a way that a more formal list procedure will not, as it minimises the chances for appointment of individuals who happen not to be known to the members of the Court. This is likely to be particularly problematic for junior arbitrators, as although the Court sees smaller cases as appropriate for such arbitrators, it does not generally attempt to promote young or female arbitrators, and concentrates solely on what it perceives as the needs of the case. This is obviously a desirable way to ensure that each case receives a quality arbitrator, but also reduces the spread of expertise and experience.

In terms of administration style, the Institution adopts a strongly “hands off” approach, as might be expected from the style of organisation that characterises the Institution’s own activities. Administration of a case is handled by a specifically appointed Case Administration Committee, however parties are free to agree on almost every aspect of the conduct of the proceedings, and representatives of the Institution do not attend hearings. In addition, no substantive or formal scrutiny is undertaken of awards, with the exception of determinations regarding costs, which must be approved by the Court.

The activities of the Swiss Chambers’ Arbitration Institution are almost exclusively focused on international arbitrations, which constitute approximately 90% of the Institution’s caseload. In this respect it benefits from the presence of a highly respected community of international arbitration practitioners, who regularly engage in top-tier international arbitration work. It is notable, however, in contrast to the leading status of Swiss international arbitration, that domestic arbitration in Switzerland remains relatively poorly developed. On one level this undoubtedly relates to Swiss courts, which are highly regarded, meaning that domestic party parties do not feel a strong need for arbitration. However, the loose structure of institutional arbitration in Switzerland, along with the dominance within that structure of individuals who work almost entirely at the top tier of international arbitration, undoubtedly plays a role as well. While most national institutions see development of the domestic arbitration market as essential to their long-term viability, the success of the Swiss Chambers’ Arbitration Institution at the international level means that a thriving domestic arbitration market is simply not essential for the Institution’s success. The domestic market is not ignored, but the international market appears clearly to be strongly prioritised. This both limits the opportunities for junior and less experienced arbitrators to gain experience before appointment at the international level, and also reduces the participation of more localised businesses in what is clearly a highly effective system of arbitration.

2.3. Specialised Topics in Arbitration

2.3.1. Commercial Arbitration and the European Union

Until recently, the relationship between EU law and international arbitration has been described as one of mutual indifference, with the two legal orders traditionally deemed merely to coexist, functioning in parallel according to distinctive logics.¹³⁰

However, some commentators have suggested that not only does arbitration not conflict with EU law, but it may offer another opportunity for giving effect to EU law in the sphere of private law.¹³¹ Arbitration has also received the approval of the European Court of Human Rights with respect to the possibility of interferences with the established right to judicial remedies and access to justice: the ECHR has confirmed the consistency of arbitration with the right to judicial remedies and the right to a fair trial (*Osmo Suovaniemi and Others v Finland*¹³²; *X v Germany*¹³³), remarking *inter alia* that a waiver of access to national courts is a common practice which has undeniable advantages for the parties as well as for the administration of justice, thus not offending the European Convention on Human Rights.¹³⁴ Therefore, the accession of the EU to the European Convention of Human Rights creates no particular problems of compatibility as far as arbitration is concerned.

Nonetheless, international commercial arbitration and EU law can interact with each other in a number of ways, and this can lead to potential inconsistencies. Indeed, such conflicts are on one level unavoidable because of the nature of the process of European integration carried out by the EU and the role attributed in this context to the establishment of a European area of justice for the adjudication of civil and commercial disputes. Arbitration, on the other hand, involves entrusting parties with the power to step outside litigation before Member State courts, thus devolving adjudicatory functions to subjects operating outside of the aforementioned European area of justice. Arbitration, then, may facilitate the EU's goals of ensuring access to efficiently-delivered justice and dispute resolution, but can also impede the EU's goals of harmonising and ensuring the application of specific substantive law. The question of the proper relationship between EU law and commercial arbitration is, therefore, paramount. Too much influence of EU law over commercial arbitration will undermine the utility of an important dispute resolution mechanism that has shown itself to be of enormous benefit to the European business community. Too little will risk allowing arbitration, in some situations, to be used as a means of avoiding otherwise applicable restrictions that are seen as important to the proper functioning of the EU. This section will examine certain of these areas of potential conflict between EU law and arbitration.

Authority to Make References for Preliminary Rulings

One long-running problem regarding the interaction of arbitration and the European Union has been the inability of arbitral tribunals to make a preliminary reference to the Court of Justice of the European Union (CJEU) for an interpretation of EU law. Such a mechanism is available to Member State national courts, and the role of arbitral tribunals as interpreters and appliers of the applicable law would suggest that they too should possess this right. After all, an award delivered in an arbitration will be enforceable in Member States with little or no substantive review of the contents of the award. As a result, an award in which an arbitral tribunal unable to make a preliminary reference to the CJEU has misinterpreted

¹³⁰ Theofrastous (1999); Shelkopyas (2004); Benedettelli (2008); Benedettelli (2011); Bermann (2012).

¹³¹ Zekos (1999); Zekos (2008)

¹³² Application no. 31737/96, Decision of 23 February 1999

¹³³ Application no. 1197/1961, Decision of 5 March 1962

¹³⁴ *Deweert v Belgium*, Case 6903/75 [1980] ECHR 1 (Feb. 27, 1980)

EU law will almost always be enforced by the courts of a Member State, even though if the dispute had been resolved before that same court, rather than through arbitration, the court itself could have made a preliminary reference to the CJEU, and thus ensured proper application of EU law. Not allowing arbitral tribunals to make preliminary references to the CJEU, then, introduces substantive inconsistencies into the application of EU law, particularly given the large number of commercial arbitrations occurring across the EU.

The legal basis for making a preliminary reference to the CJEU is set forth in Article 267 TFEU:

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of the Treaties;
- (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

The difficulty raised by this text with respect to arbitration arises from the term “court or tribunal of a Member State”. The long-standing position of the CJEU is that arbitrators or arbitral tribunals in a traditional commercial arbitration do not have legal standing to make preliminary references to the Court, as they do not constitute a “court or tribunal of a Member State” under Article 267 TFEU. This is the case even if the tribunal is seated in a Member State.¹³⁵

According to the CJEU the criteria by which a “court or tribunal of a Member State” is identified, drawn from Case 61/65 *Vaassen (née Göbbels)* [1966] ECR 261, are the following:

- (1) the tribunal must be established by law
- (2) it must be permanent
- (3) it must respect the requirements of due process
- (4) it must apply rules of law
- (5) it must exercise compulsory jurisdiction over parties appearing before it¹³⁶

The CJEU has interpreted and applied these standards in several cases, and a clear stance against the recognition of commercial arbitration tribunals as “court[s] or tribunal[s] of a Member State” has developed. In *Nordsee*, the ECJ emphasised the voluntary nature of

¹³⁵ *Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG* (Case 102/81) [1982] ECR 1095)

¹³⁶ *Cartesio* (case C-210/06); *Synetairismos Farmakopoion Aitolias & Akarnanias v GlaxoSmithKline plc* (case C-53/03); *Abrahamsson and Anderson v Fogelqvist* (case C-407/98); *Municipality of Almelo v NV Energiebedrijf*

arbitral jurisdiction, noting that while “the parties were free to leave their disputes to be resolved by the ordinary courts or to opt for arbitration by inserting a clause to that effect in the contract...[they] were under no obligation, whether in law or in fact, to refer their dispute to arbitration”.¹³⁷ The first difference between arbitral tribunals and Member State courts underlined by the CJEU is that the parties to an arbitration are under no obligation, “whether in law or in fact”, to submit to the jurisdiction of the tribunal. This part of the reasoning reflects the idea that the role of the judge requires a certain degree of coercion, i.e. the possibility to declare the law and render a binding decision against unwilling parties. According to the Court of Justice, an adjudicator qualifies as “court or tribunal” only where parties are obliged to accept its jurisdiction. The second difference the Court relies upon in order to conclude that arbitral tribunals do not fall within the scope of Article 267 TFEU is that the public authorities of the seat are not involved in the decision to opt for arbitration and do not automatically intervene in the proceedings, but have a mere supporting role of *juge d’appui*. Therefore, even if there is a functional link between arbitral tribunals and State courts, according to *Nordsee* this connection is not strong enough to conclude that arbitral tribunals qualify as “courts or tribunals” under Article 267 TFEU. The underlying rationale of this part of the reasoning is that national judges have an underived power to administer justice, whilst other tribunals or adjudicatory bodies can acquire a derived power, and therefore qualify as courts of a Member State, only if there is a strong enough connection between them and the judiciary of said State. Preliminary references from arbitral tribunals were also rejected on this ground in *Denuit* [2005] ECR I-923.¹³⁸ According to *Denuit*, in order to determine whether a body making a reference is a court or tribunal, the Court of Justice takes into account a wide number of factors, such as whether the body is established by law, whether it is temporary or permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent. The Court thus concluded that arbitral tribunals cannot be considered courts or tribunals within the meaning of Article 267 TFEU, albeit fulfilling many of the aforementioned requirements. The main argument put forth in *Denuit* is that the involvement of State courts in the arbitral proceedings is not necessary and automatic, although the procedural system of the seat recognises arbitration as a method of adjudicatory dispute resolution. In other words, according to the Court, a private body can be considered a court or tribunal of a Member State only if it merges with public authority, exerting an authoritative power on its behalf and automatically involving the judiciary in the proceedings.

By contrast, in the *Danfoss* case¹³⁹ and most recently in *Merck*,¹⁴⁰ the CJEU has accepted a preliminary reference from an arbitral tribunal where either participation in the arbitration was legally mandatory (*Danfoss*), or the tribunal itself was highly integrated into the Member State’s legal system (*Merck*).

In conclusion, according to the CJEU case-law, the distinguishing element of an arbitral tribunal vis-à-vis its status as a “court or tribunal of a Member State” relates to its form and not to the legal principles that it applies. Thus, an arbitral tribunal is not a “court or tribunal of a Member State” where, for example, the disputing parties are not bound to arbitrate and the tribunal is independent of public authorities.¹⁴¹ By contrast, however, a national court hearing a challenge to an arbitral award is a “court or tribunal of a Member

Ijsselmij (case C-392/92); Dorsch Consult v Bundesbaugesellschaft Berlin (case C-54/96); Pretore di Salò (case 14/86).

¹³⁷ Para 11

¹³⁸ Case C-126/97 *Eco Swiss* [1999] ECR I-3055 and Case C-125/04 *Denuit and Cordenier* [2005] ECR I-923

¹³⁹ (ECJ Judgment of 17 October 1989, Case 109/88, Handels- og Kontorfunktionærernes Forbund I Danmark v. Dansk Arbejdsgiverforening, acting on behalf of Danfoss [1989] ECR 3199)

¹⁴⁰ Case C-555/13 *Merck Canada Inc.* (2014)

¹⁴¹ *Nordsee*, cit. supra note nr. 6, paras 11-13

State”, able to make a preliminary reference, even though the question it is referring is one that has arisen in an arbitration.¹⁴²

The problem raised by the CJEU’s emphasis on the voluntary nature of arbitral jurisdiction and the formal independence of commercial arbitration tribunals from national legal systems is that the structure of arbitration laws throughout the European Union means that once parties have entered into an arbitration agreement, the arbitral tribunal does not act merely as an alternative to a national court, but rather as a replacement of it. Neither party, that is, may change its mind and insist on the dispute being resolved in a national court. In addition, once the award is delivered it will be enforced by national courts with almost no substantive review of its contents. Arbitral tribunals play a key role in the adjudication of civil and commercial disputes in the European Union: in light of this, it is important to ensure that arbitral tribunals apply EU law correctly and consistently.

One solution to this problem is for Member States to pass legislation allowing arbitral tribunals to ask a court in the Member State in which the arbitration is seated to make a preliminary reference on their behalf, as is the case under the Danish Arbitration Act.¹⁴³ However, unless EU law requires Member States to make such a procedure available to arbitral tribunals, inconsistencies in the application of EU law by arbitral tribunals will still remain, depending entirely on the Member State in which arbitral tribunals happened to be seated. On the contrary, were such a provision mandated, a mechanism would be available to maximise the consistent application of EU law even within arbitration.

In conclusion the current situation, in which arbitral tribunals play a significant role in the application of EU law in the commercial context, but lack the ability to gain clarification from the CJEU, is clearly problematic.

Private International Law, EU Law, and Arbitration

Despite the tendency of the EU to address an increasing number of policy and legal areas in its regulation and promotion of the internal market, private international law has traditionally been left untouched, on the rationale that the EU was not originally conceived to regulate purely private legal relations. This idea was reflected in the EEC Treaty, which did not require harmonisation of the laws of the Member States in the field of private international law. As a result, this area was separately regulated by Member States, including through the signing of international conventions.¹⁴⁴ In this respect, Member States signed the 1968 Brussels Convention on Jurisdiction and the Recognition of Judgements in Civil and Commercial Matters and the 1980 Rome Convention on the Law Applicable to Contractual Obligations.

It was only with the 1999 Treaty of Amsterdam that private international law was finally integrated into the first pillar of EU law, with the 1968 Brussels Convention being incorporated into Council Regulation 44/2001 (known as “Brussels I”). Brussels I was directly applicable, forming part of the law of the Member States without any further implementation.

(i) Brussels I

Brussels I expressly excludes arbitration from its scope of application.¹⁴⁵ This exclusion was motivated by the original relationship between the 1968 Brussels Convention and the 1958 New York Convention on Arbitration, the consensus that recognition and enforcement of

¹⁴² *Municipality of Almelo*, cit. supra note nr. 6.

¹⁴³ Section 27(2). On this provision see generally Terkildsen & Nielsen (2012).

¹⁴⁴ Bermann (2012).

¹⁴⁵ Article 1(2)(d).

arbitral awards was already efficiently addressed in the latter suggesting that arbitration should not be included in the scope of application of the former.¹⁴⁶

The exclusion of arbitration from the scope of Brussels I was confirmed in CJEU case-law in *Marc Rich*,¹⁴⁷ where the Court held that proceedings in the court of a Member State for the appointment of an arbitrator were excluded from the Brussels Convention (now Article 1(2)(d) of Brussels I). Moreover, the CJEU enunciated the basic “subject-matter” criterion: whenever the subject-matter of the proceedings is arbitration, the Brussels Convention should not apply, even if the proceedings are conducted before a State court and not before an arbitral tribunal. The CJEU also affirmed, however, that a preliminary question regarding the validity of an arbitration clause did not affect the applicability of the Brussels Convention: parallel civil and arbitral proceedings in different Member States were thus held possible, when the validity of an arbitration clause is affirmed by an arbitral tribunal but rejected by the courts of a Member State.

The CJEU further clarified in *Van Uden*¹⁴⁸ that, in order to determine if judicial proceedings have arbitration as their main object, consideration has to be given as to whether the relevant action is aimed at protecting the right to settle disputes through arbitration.¹⁴⁹ In light of this, the Court concluded that interim measures are not covered by the arbitration exclusion, even when the parties have concluded an arbitration agreement, since such measures are not ancillary, but merely parallel to arbitration.

Later case-law, however, resulted in much more significant involvement of EU law in the arbitral process, ultimately triggering the reform of the Brussels I Regulation. In particular, the *West Tankers* case raised concerns within the arbitration community regarding tensions between EU law and international arbitration and namely that European courts might limit the principle of party autonomy, one of the cornerstones of arbitration.

(ii) The *West Tankers* saga

The *West Tankers* case¹⁵⁰ has triggered a debate between civil and common law lawyers regarding the role of the EU with respect to anti-suit injunctions. These are actions whereby a court orders a party to a dispute not to commence or continue court proceedings before another judicial authority. In the context of arbitration, these are ordered with the goal of thereby protecting the jurisdiction of an arbitral tribunal. Anti-suit injunctions are a familiar tool in common law jurisdictions, and failure by a party to obey an anti-suit injunction can result in the party being held in contempt of Court, with sanctions consequently being applied by the court.

Prior to the *West Tankers* case, it was already clear that EU law prohibited anti-suit injunctions being ordered with respect to proceedings in the courts of another EU Member State, under the principle of “mutual trust”. In 2003, in *Gasser v Misat*,¹⁵¹ the CJEU held that Member States courts are entitled to the mutual trust of all other courts. Consequently, if parties have entered into a choice of forum agreement, and one of the parties starts proceedings before a Member State court other than the one mentioned in the agreement, while the other party commences proceedings in the court mentioned in the agreement, the latter court must nonetheless stay its proceedings until the former has had the opportunity to decide on its own jurisdiction. Subsequently, in the 2004 case of *Turner*

¹⁴⁶ Jenard (1979).

¹⁴⁷ Case C-190/89 [1991] ECRI-3855

¹⁴⁸ *Van Uden v Deco-Line* (Case C-391/95) [1998] ECRI-7091

¹⁴⁹ Paras 30-33.

¹⁵⁰ Case C-185/07, *Allianz SpA & Generali Assicurazioni Generali SpA v West Tankers Inc.*, 2009 WL 303723, 18 (Feb. 10, 2009)

¹⁵¹ Case C-116/02, *Erich Gasser GmbH v. MISAT Srl.*, 2003 E.C.R. I-14693

v Grovit,¹⁵² the CJEU extended the concept of mutual trust even further, holding that an anti-suit injunction by an English Court constituted an unacceptable interference with the jurisdiction of another Member States court, and was consequently inconsistent with the requirements of EU law.

The novelty of the *West Tankers* case, then, was primarily that it involved international arbitration, which was explicitly excluded from Brussels I. In this case, a vessel owned by West Tankers and chartered by Erg Petroli collided with a jetty in the Italian port of Siracusa. Allianz and Generali, Erg's insurers, compensated Erg and filed an action for subrogation against West Tankers before the Italian Court of Siracusa. The Italian Court claimed jurisdiction for tort liability under Article 5(3) of Brussels I, according to which "[a] person domiciled in a Member State may, in another Member State, be sued in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur".

West Tankers and Erg, however, had concluded an arbitration agreement, providing for arbitration in London under English law. West Tankers, therefore, sought and obtained an anti-suit injunction from the English High Court on the ground that court proceedings other than arbitration had been initiated in Italy. On appeal, the House of Lords refer to the CJEU the question of the compatibility of the injunction with Brussels I.

While the CJEU's decisions in *Gasser* and *Turner* would suggest that the English court's anti-suit injunction was inconsistent with EU law, a complication existed in that Article 1(2)(d) of Brussels I carves out a general exclusion for matters of arbitration. Indeed, the CJEU expressly recognised that because of the arbitration exclusion in Brussels I, *Gasser* and *Turner* did not directly apply, and the proceedings resulting in the anti-suit injunction were not themselves covered by Brussels I.¹⁵³

Nonetheless, despite this recognition, the CJEU still held that an anti-suit injunction of this type is not compatible with Brussels I because it deprives Member State courts of their power to rule on their own jurisdiction. In other words, even if anti-suit injunctions are ancillary to arbitration and therefore themselves fall outside of the scope of application of Brussels I, the State court proceedings that the anti-suit injunctions are attempting to prevent do fall within the scope of Brussels I. Brussels I, in turn, entails that each Member State court must be free to exercise the power to assess its own jurisdiction, and other Member State courts must not interfere with this power, in light of the principle of mutual trust. As a result, the CJEU concluded that each Member State court, when seised of an action covered by an arbitration agreement, must be allowed to rule on its own jurisdiction and to refer the parties to arbitration where appropriate.

This holding raised serious concerns amongst many arbitration practitioners, on the ground that a party to an arbitration agreement will ultimately be left powerless until the seised court has ruled on its jurisdiction, thus creating uncertainty and causing delays or tactical parallel proceedings, in addition to increasing costs.

In the course of the CJEU judgement, West Tankers had continued parallel arbitration proceedings against the insurers to claim compensation for the damages suffered, consisting of legal fees and expenses for the ordinary proceedings and indemnification against any liability that could be established by the Court which may be greater than that established in the arbitration. In April 2011 the arbitral tribunal published an award in which it declared lack of jurisdiction following the CJEU judgement, on the basis of respect for the insurer's fundamental right to bring the action before a national court. Recognising

¹⁵² Case C-159/02, Gregory Paul Turner v. Felix Fareed Ismail Grovit, Harada Ltd., 2004 E.C.R. I-3565

¹⁵³ See para. 23: "Proceedings, such as those in the main proceedings, which lead to the making of an anti-suit injunction, cannot, therefore, come within the scope of Regulation No. 44/2001".

the established supremacy of EU law against national law, the tribunal concluded that the right to bring proceedings in courts having jurisdiction under Brussels I must prevail over the right to be sued exclusively before an arbitral tribunal in the presence of an arbitration agreement.

West Tankers appealed the tribunal's ruling under Section 69 of the English Arbitration Act. In April 2012, the England and Wales High Court rejected the arbitral decision and found that the tribunal was not deprived by reason of EU law of the jurisdiction to award damages for breach of the obligation to arbitrate.¹⁵⁴ It stated, *inter alia*, that the principle under which anti-suit injunctions breach mutual trust cannot apply to arbitral tribunals, since EU law obligations do not apply to them. In conclusion, the High Court established that the arbitral tribunal was wrong to conclude that it did not have jurisdiction to make an award of damages for breach of the obligation to arbitrate or for an indemnity.

Such a conclusion is highly problematic from the point of view of EU law, since it leads to a nullification of the effects of the Member State court judgment. In other words, even if it does not deprive Member State courts of the power to rule on their own jurisdiction, it annuls all practical effects of the ensuing judgment. Since the Brussels I system and the principle of mutual trust enshrined therein aim at ensuring that Member States court judgments circulate freely and produce effects in the entire European Union, there is a strong case that allowing an arbitral tribunal to award "damages for damages" is incompatible with EU law, since it cancels the *effet utile* of Brussels I.

Even stronger arguments supporting this view can be found in the Recast Brussels I Regulation, as the abolition of *exequatur* clearly militates in favour of a reinforcement of the principle of mutual trust, which imposes on all Member States a duty to recognise and enforce judgments made by other Member State courts automatically. The implementation of such a system, whereby recognition and enforcement can be denied only on specific and exhaustive grounds set forth in Article 45 of the Recast Brussels I Regulation, seems to be incompatible with the possibility for an arbitral tribunal seated in a Member State to deprive a judgment made by the court of another Member State of all practical effects.

In the end, *West Tankers* exhibits a clash between the regime of international arbitration and that of EU law, creating a number of uncertainties. The situation was made even more complex by the interpretation that *West Tankers* was given by some national courts. In the *Endesa* case,¹⁵⁵ for example, the English Court of Appeal considered whether a Spanish judgement, not ruling on the merits of the case but holding that an arbitration clause was not validly incorporated into the main contract, was binding in proceedings before the Commercial Court in London. In the English proceedings, the claimant sought an anti-suit injunction to prevent the defendant making a claim in court rather than before the arbitration tribunal in London. The English Court, after dismissing the application for an anti-suit injunction under the rule set forth in *West Tankers*, granted a declaration holding that the Spanish judgement was not binding on the arbitral tribunal as its proceedings fell outside Brussels I.

The English Court of Appeal overruled the lower court's judgement, declaring that, consistently with the subject-matter criterion set forth by the CJEU, the Spanish judgement was not caught by the arbitration exclusion and that therefore the English Court was obligated to recognise it. In other words, the Court of Appeal concluded that, since the main subject-matter of the proceedings brought before the Spanish court fell within the scope of application of Brussels I, then the Spanish court's judgment on jurisdiction, merely

¹⁵⁴ 2012 EWCH 854 (Comm).

¹⁵⁵ *National Navigation Co v Endesa Generacion SA* [2009] EWCA Civ 1397.

stating that the arbitration clause was not validly incorporated in the main contract, must itself be respected by other Member State courts under Brussels I.

This interpretation of *West Tankers* has been highly controversial, as it was argued that it made it possible for any party to an arbitration agreement to nullify the effects of that agreement by simply seising a friendly national court. The problems arising from *West Tankers* and from the interpretation of *West Tankers* given in *Endesa* triggered debates on reforms to the Brussels I system.

(iii) The recast of Brussels I

Indeed, one of the main shortcomings of Brussels I identified by the European Commission, after engaging in a consultation process, concerns the interface between international arbitration and litigation. The point of contention was precisely that Brussels I could undermine the effect of arbitration agreements, as particularly highlighted by the *West Tankers* case, as well as the additional costs and delays Brussels I entailed for parties involved in arbitration proceedings.¹⁵⁶ A 2009 European Commission Green Paper identified a number of changes to be introduced to Brussels I, including the partial deletion of the arbitration exception from Brussels I and the introduction of an exclusive jurisdiction of the courts of the seat of arbitration over the validity of the arbitration agreement. In essence, the Commission's Proposal radically changed the role of arbitration in Brussels I, introducing a new rule on jurisdictional conflicts, purporting thereby to enhance the effectiveness of arbitration agreements within the EU and to prevent parallel court and arbitration proceedings.

The resulting recast Regulation 1215/2012 ("Recast Regulation"), due to enter into force from 10 January 2015, has not retained much of the Commission Proposal, as the arbitration exclusion is maintained at Article 1(2)(d). However, the interaction of the Regulation with arbitration is dealt with in the Preamble under Recital 12. The Recital is not a binding provision, but merely aims at clarifying the scope of the arbitration exclusion and at resolving some of the problems arising from *West Tankers* and *Endesa*. Furthermore, the Recast Regulation expressly enshrines the precedence of the New York Convention over Brussels I, at Article 73(2).

At paragraph 1, the Recital makes it clear that the national law of the Member States should govern what national courts will have to do when matters relating to an arbitration agreement arise, stating that:

"nothing in this Regulation should prevent the courts of a Member State, when seised of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law".

The first paragraph, therefore, confirms the arbitration exclusion and makes it clear that Member States are free to comply with their international obligations under the New York Convention.¹⁵⁷ Therefore, whether Member State courts can rule on the existence and the validity of an arbitration agreement and whether they can do so incidentally, or also as a principal subject-matter, exclusively depends on the contents of the arbitration law of the seat of the arbitration.

The second paragraph of Recital 12 clarifies the scope of the arbitration exclusion, stating that Member State court judgments on the existence and validity of an arbitration

¹⁵⁶ European Commission, COM 2010 748 final.

¹⁵⁷ Even if this Paragraph does not expressly mention the New York Convention, its wording is a clear reference to this international instrument and on the ensuing obligations on Member States.

agreement do not circulate under the Recast Regulation. That is, they do not bind the courts of other Member States. This is so regardless of whether the court decided on such a matter as a principal or as an incidental question. This provision clearly aims at resolving the main problem arising from *Endesa*: under the new Regulation, the Spanish judgment would have no binding effects on English courts or on the arbitral tribunal. This paragraph, therefore, does not overrule *West Tankers* itself, but rather the particular interpretation the CJEU case-law was given in *Endesa*: notwithstanding the subject-matter criterion, judgments exclusively dealing with the existence and validity of an arbitration agreement fall within the scope of Article 1(2)(d).

In turn, the third paragraph affirms that:

“where a court of a Member State, exercising jurisdiction under this Regulation or under national law, has determined that an arbitration agreement is null and void, inoperative or incapable of being performed, this should not preclude that court’s judgment on the substance of the matter from being recognised or, as the case may be, enforced in accordance with this Regulation. This should be without prejudice to the competence of the courts of the Member States to decide on the recognition and enforcement of arbitral awards in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958 (the New York Convention), which takes precedence over this Regulation”.

Therefore, judgments on the merits are in principle always entitled to circulate under the Recast Regulation, even in case the Member State court has also had to rule on the (in)existence or (in)validity of the arbitration agreement in order to affirm its own jurisdiction over the case. This is an important clarification as, in the absence of such a rule, it would be possible for any party to avoid the international circulation of a court judgment under Brussels I by simply alleging that the claim is covered by an arbitration agreement (the so-called “super torpedo”).¹⁵⁸

The possibility for a judgment on the merits to circulate under the Recast Regulation is without prejudice to the possibility of Member State courts recognising and enforcing a conflicting arbitral award under the New York Convention, which prevails over the Regulation pursuant to Article 73(2). Therefore, the rationale of Paragraph 3 is twofold: on the one hand it aims at ensuring the functionality of Brussels I even when a defence of lack of jurisdiction due to the existence of an arbitration agreement has been raised, but on the other hand it makes it clear that recognising and enforcing a conflicting arbitral award would never be tantamount to a violation of EU law, since the New York Convention takes precedence over the Recast Regulation. Although the provision correctly aims at striking a balance between the circulation of arbitral awards and the *effet utile* of Brussels I, its practical implementation raises several problems.

From the point of view of the arbitral award, it can be questioned whether an arbitral tribunal is likely to reach a conflicting decision once a Member State court has ruled on the merits of the case. A court decision is binding on the parties and can produce *res judicata* effects, and so the arbitral tribunal is in principle bound to respect it. Therefore, issuing a conflicting award arguably entails disregarding *res judicata*: this, however, could lead to the award being set aside at the seat of arbitration, in case the applicable *lex arbitri* indicates the violation of *res judicata* as a ground for annulment.¹⁵⁹ Moreover, the award

¹⁵⁸ Nielsen (2012), at 273; Illmer (2011), at 666; Fentimann (2011).

¹⁵⁹ See, e.g. *Planor Afrique SA v. Société Emirates Télécommunications corporation “Etisalat”*, 17 January 2012, *Cour d’Appel de Paris* (2012) 3 Rev Arb 569 (setting aside an arbitral award that disregarded an earlier judgment issued by a foreign Court and recognised in France under an international convention). In other jurisdictions, such as Italy, the conflict with a court judgment is treated as a specific ground for annulment: see Italian Code of Civil Procedure, Article 820(1)(8). A recent, well-known example of an arbitral award being set aside because of its

could be denied recognition and enforcement, in light of its conflict with a court judgment. Although this must be seen as a highly undesirable consequence, which can be avoided through an arbitration-friendly interpretation of the New York Convention, it must be considered that two grounds could, in principle, be invoked. Firstly, recognition and enforcement could be denied under Article V(2)(b) of the New York Convention, in case the requested State court deems *res judicata* to form part of the forum's public policy. Secondly, the refusal could be based on Article V(1)(a), as it could be argued that the *res judicata* effect renders the arbitration agreement inoperative. In conclusion, although refusing recognition and enforcement would, in this context, be contrary to the overall aim and spirit of the New York Convention, it cannot be denied that the problem of a conflict between an arbitral award and an earlier Member State court judgment is far more complex than emerges from the literal wording of Paragraph 3.

From the point of view of the Member State court judgment, it is necessary to determine whether it could be denied recognition and enforcement under Article 45 of the Recast Regulation because of its conflict with an arbitral award. Two situations must be differentiated. Firstly, if recognition and enforcement of the Member State court judgment is sought in a State other than the seat of arbitration, Article 45(1)(a) of the Recast Regulation is potentially applicable.¹⁶⁰ Although the public policy test does not apply to jurisdiction, it could be argued that recognising the court judgment would run contrary to the international obligations of the requested State under the New York Convention, which expressly takes prevalence pursuant to Article 73(2). This, however, entails an extensive interpretation of the Convention itself, which was not conceived as regulating or limiting the recognition of court judgments irreconcilable with an arbitral award.

Another potentially applicable provision is Article 45(1)(d),¹⁶¹ as recognition and enforcement could be denied on grounds of irreconcilability with an earlier judgment given in another Member State or in a third State, fulfilling the conditions for recognition in the Member State addressed. In this context, the concept of "earlier judgment" should be interpreted extensively: the fact that it also includes judgments given in third States demonstrates that this notion of "judgment" is not the one of judgment circulating under the Regulation. On the contrary, Article 45(1)(d) expressly limits the *effet utile* of the Recast Regulation, in order to ensure a thorough respect of the principle of *res judicata*. In light of this, there is no reason not to include arbitral awards in the scope of Article 45(1)(d) as well.¹⁶² This provision, however, is only limited to "earlier" judgments, and cannot therefore be invoked to deny recognition and enforcement, where the Member State court judgment has been issued before the arbitral award.

On the other hand, if recognition and enforcement of the judgment is sought at the seat of arbitration, there are even stronger reasons to argue that Article 45(1)(a) should not apply, since the New York Convention does not apply to domestic arbitration. As a result, there is no reason to conclude that recognising a conflicting court judgment would be incompatible with the international obligations of the Member State. On the contrary, recognition and

irreconcilability with an earlier judgment can be found in sports arbitration: *Club Atletico de Madrid SAD v. Sport Lisboa e Benfica Futebol SAD*, 13 April 2010, Swiss Federal Tribunal (2010) 28(3) ASA Bull 511.

¹⁶⁰ Under Article 45(1)(a), the recognition of a judgment shall be refused if such recognition is manifestly contrary to public policy (*ordre public*) in the Member State addressed.

¹⁶¹ Under Article 45(1)(d), the recognition of a judgment shall be refused if the judgment is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed.

¹⁶² Teixeira de Sousa & Soleti (2012), at 745-746; Radicati di Brozolo (2011), at 455; Briggs & Rees (2009), at 699-701.

enforcement could be denied under Article 45(1)(c),¹⁶³ as the same arguments militating in favour of the extensive interpretation of Article 45(1)(d) apply here as well. In this context, the exception applies even if the domestic award has been issued after the Member State court judgments.

The possibility of avoiding recognition and enforcement of a Member State court judgment in light of its conflict with an arbitral award has led to an interesting evolution, relating again to the *West Tankers* case. In particular, English Courts have confirmed that a declaratory arbitral award, simply stating that a party is not liable, can be enforced like a judgment.¹⁶⁴ In this context, recognition obviously does not aim at forcing the losing party to comply with the award, as the arbitral decision is merely declaratory in nature and does not impose any particular behaviour, but rather serves the purpose of avoiding recognition and enforcement of a conflicting foreign judgment on the same subject matter. In other words, this decision ensures the prevalence of arbitration over court proceedings by extending the scope of application of Section 66 of the Arbitration Act. It is likely that the tendency to seek recognition of declaratory arbitral awards will increase in the future, in order to hinder the circulation of conflicting court judgments. This must be seen as a consequence of the Brussels I system and, in particular, of the ongoing possibility of parallel proceedings.

Finally, Recital 12 entails that the Recast Regulation should not apply to actions or ancillary proceedings relating to the establishment of an arbitral tribunal, the powers of arbitrators, the conduct of an arbitration procedure or any other aspects of such a procedure, nor to any action or judgment concerning the annulment, review, appeal, recognition or enforcement of an arbitral award.¹⁶⁵ This provision, however, does not mention anti-suit injunctions, which must be considered still incompatible with EU law. There is no reason to conclude that the position the CJEU has taken in *West Tankers* will change under the Recast Regulation: as much as the court proceedings which the anti-suit injunction prevents deal with civil or commercial matters falling within the scope of application of Brussels I, the measure must be considered incompatible with the principle of mutual trust, as enshrined in the ECJ case-law.

A subtler question is whether arbitral tribunals can grant anti-suit injunctions, and more importantly whether such injunctions must be respected by Member State courts. As arbitral tribunals are not courts of a Member State, they are not bound by Brussels I, and so are entirely free to issue anti-suit injunctions. However, through application of the subject-matter criterion,¹⁶⁶ an award containing an anti-suit injunction should be seen as incompatible with EU public policy, since it prevents Member State courts from exercising jurisdiction under Brussels I, just as would a court-issued measure. Consequently, a Member State court should be understood as having no obligation to enforce an anti-suit injunction issued by an arbitral tribunal in the form of an arbitral award, even though the tribunal has not acted inappropriately by making the order. Notably, this question should be resolved soon by the CJEU, as a preliminary reference on precisely this issue has been filed by the Lithuanian Supreme Court.¹⁶⁷

¹⁶³ Under Article 45(1)(c), the recognition of a judgment shall be refused if the judgment is irreconcilable with a judgment given between the same parties in the Member State addressed.

¹⁶⁴ [2011] EWHC 829 (Comm); [2012] EWCA 27.

¹⁶⁵ For a very detailed analysis of the recast Regulation in the context of international arbitration see Carducci 2013.

¹⁶⁶ The subject-matter criterion applies to the court proceedings which the anti-suit injunction addresses and not to the injunction proceedings *per se*.

¹⁶⁷ Request for a preliminary ruling from the Lietuvos Aukščiausiasis Teismas (Lithuania) lodged on 14 October 2013 – Gazprom OAO, other party to the proceedings: Republic of Lithuania, Case C-536/13.

(iv) Possible Ways Forward

In principle, there are good reasons to argue that a uniform European regime on arbitration would be beneficial for the European Union. On the one hand, arbitration is currently excluded from the Brussels I regulation; on the other hand, the efficient judicial system created by Brussels I is essential for the functioning of the Internal Market. Cooperation between Member State courts is particularly important, as it ensures a uniform application of mandatory EU law; therefore, the existence of a parallel system of adjudication, entirely falling within the competence of Member States, cannot be considered an optimal solution from the point of view of the Union.

Although the European Union aims at ensuring a consistent application of EU law, this is not in itself enough ground to conclude that the arbitration exclusion in the Brussels I regulation should be abolished. Several reasons militate against such a conclusion: first of all, the current application of the New York Convention by Member States has proved effective, contributing greatly to the dramatic rise in popularity of arbitration. Therefore, including arbitration in the Brussels I system may have the undesirable effect of interfering with the functioning of the New York Convention, thereby decreasing the independence of arbitral proceedings from the influence of national courts and reducing the appeal of Member States as seats of arbitration. Moreover, the practice of arbitration still has some significant elements of diversity in different Member States, whilst its inclusion in the Brussels I regulation would entail a uniform interpretation of the fundamental concepts of this field of law within the EU.

For these reasons it can be concluded that a complete abolition of the arbitration exception would be problematic and, in any case, premature. However, some more limited amendments could improve the current system and resolve the problems arising from the interaction between arbitration and State court proceedings.

As described above, the main problem arising from the current framework is the possibility of escaping the effects of an arbitration agreement by commencing litigation before a Member State court. Whilst the Recast Brussels I Regulation partially resolves this problem, by expressly stating that court judgments relating exclusively to the existence and validity of an arbitration agreement do not circulate under the Regulation, parallel proceedings and conflicting decisions are still possible.¹⁶⁸ As a result, doubts arise as to the practical functioning of the Recast Regulation, as far as both the arbitral award and the conflicting court decision are concerned. A way to resolve these problems would be to avoid parallel actions with a mechanism of stay of the court proceedings brought in breach of the arbitration agreement.¹⁶⁹

In this sense, it could be provided that only the State courts at the seat of arbitration may decide whether the arbitration clause is valid. Whenever a different Member State court is seised of an action which is covered by the arbitration agreement, such Court would have to stay the proceedings if the defendant raised an objection based on the existence of the agreement and applied to the State court at the seat of the arbitration for declaratory relief as to the existence and validity of the arbitration agreement.

In order to achieve this result, it would not be necessary to delete the arbitration exception entirely; on the contrary, maintaining the exclusion would in many respects be beneficial for the practice of arbitration (a complete inclusion of arbitration in the Brussels I system would entail, *inter alia*, the automatic circulation of judgments ruling on arbitral awards, thus interfering with the arbitration-friendly attitude of some Member States as to

¹⁶⁸ Gaffney (2014).

¹⁶⁹ Similar proposals have been put forth by Hess, Pfeiffer and Schlosser (2005), initially proposing a more far-reaching abolition of the arbitration exclusion; van Houtte (2005).

recognition and enforcement of awards). The only necessary change to the arbitration exclusion would relate to ancillary proceedings, i.e. measures issued by the State court at the seat of arbitration in support of arbitral proceedings, which would have to be included in the scope of application of the Regulation.¹⁷⁰ Declaratory judgments issued by the court at the seat, upholding the validity of the arbitration agreement, would qualify as ancillary measures, as they aim at supporting arbitration. The consequence of such a solution would be that, once a court at the seat of the arbitration has concluded that a valid arbitration clause exists between the parties, the court of the other Member State, which had previously stayed its proceedings, would have to decline jurisdiction, as the declaratory judgment as to the existence and validity of the clause would circulate under Brussels I.

Although such a mechanism would avoid conflicts of decisions, thus resolving the problems arising from the current system, its implementation would, in some respects, be problematic, as it would entail some important changes to the legal framework and practice of arbitration in the European Union. Three main problems must be taken into consideration: (1) the relationship between the proposed mechanism of stay and Article II of the New York Convention; (2) the compatibility of declaratory relief proceedings with the negative effect of *competence-competence*; and (3) the definition of the seat of arbitration.

Firstly, under Article II(3) of the New York Convention, State Courts must refer the parties to arbitration when the subject-matter of the action brought before them is covered by an arbitration agreement. The implementation of a stay mechanism is not technically incompatible with the aforementioned provision of the New York Convention, as it would simply entail that the assessment by one Member State court as to whether the agreement is “null and void, inoperative or incapable of being performed” would be ceded to a different Member State court. Since all Member States are members of the New York Convention, there is, in principle, no risk that such a system would conflict with the operation of Article II.

Secondly, some Member States, such as France, recognise a negative effect of the principle of *competence-competence*: in these jurisdictions, State courts do not have jurisdiction over questions of the existence and validity of the arbitration agreement, but must instead refer parties to arbitration whenever the arbitration clause is not manifestly inexistent or null. In such States, therefore, it would not be possible for courts to rule on the validity of an arbitration agreement, as the arbitral tribunal has almost-exclusive jurisdiction over the question. A possible solution to this problem would be for the court seised at the seat to stay its proceedings, in turn, and refer the parties to arbitration; the arbitral tribunal would then be able to issue a partial award on jurisdiction, which the State court could uphold, issuing a declaratory judgment which incorporates the arbitral decision and thus producing binding effects on other Member State courts, including the one seised of an action falling within the scope of the arbitration agreement.

It should be acknowledged, though, that implementation of this solution would not be problematic, as national procedural law may not provide for such a mechanism of stay of proceedings between national courts: this is the case in France, where national courts simply deny jurisdiction and refer the parties to arbitration whenever the arbitration agreement is not manifestly null and void. Therefore, implementation of the above-described mechanism would entail some significant changes in the procedural law of some Member States.

The third problem is the definition of the seat of arbitration. This concept is particularly important under this proposal, as the national courts at the seat would have exclusive

¹⁷⁰ Provisional measures, on the contrary, would not be affected, as they are merely parallel, and not ancillary to arbitration proceedings.

jurisdiction over the existence and validity of the arbitration agreement and their decision would circulate under Brussels I. However, whenever the seat has not been selected by the parties in the agreement, and has not yet been determined by the arbitral tribunal, it would be necessary to resort to a fall-back provision, according exclusive jurisdiction to a certain Member State court to rule on the existence and validity of the arbitration agreement.

Some proposals argue that, in the absence of determinations as to the seat of arbitration, declaratory relief relating to the existence and validity of an arbitration clause could be provided by the Court that would have general jurisdiction over the dispute under Brussels I if there was no arbitration agreement.¹⁷¹ Such a provision would have the positive effect of identifying a competent State court without imposing a uniform definition of the seat of arbitration on all Member States, as the latter solution would imply a significant invasion of the policy space of the Member States in the field of procedural law.

On the other hand, however, the determination of the competent State court could in some instances be a complicated problem. The practical implementation of the stay mechanism, therefore, could be problematic when the parties have not determined the seat in their agreement. Nonetheless, the proposed stay mechanism offers an efficient solution to an important problem, and is worthy of further consideration.

Public Policy

Public policy limits the exercise of party autonomy when the latter is contrary to imperative norms or fundamental principles of law. In the case of arbitration, it may limit the enforceability of arbitration agreements. Under Article V(2)(b) of the New York Convention, public policy is one of the limited grounds on which courts asked to enforce an arbitration award may refuse to do so.

When the public policy exception was included in the New York Convention, there were concerns that it would be used by courts around the world to reject enforcement of any award that contradicted domestic policy norms in some way. Overwhelmingly, however, courts have interpreted the exception narrowly, and in the light of the pro-enforcement bias of the New York Convention, rejecting the view that the public policy exception applies whenever an award is inconsistent with domestic law. Rather, Article V(2)(b) is applied where the policy violated was one recognised as fundamental to international commerce, to due process and a fair trial, or to the most fundamental norms of the State in which enforcement is sought.¹⁷² Thus, to be annulled, the award has to offend or contradict a norm of the legal system that is deeply rooted in the most fundamental values or notions of justice and morality of society.

Brussels I also includes a public policy exception, expressly allowing Member State courts to refuse enforcement of judgments from the courts of another Member State where those judgments are “manifestly contrary to public policy in the Member State in which recognition is sought” (Article 34(1)). Importantly, the meaning of “public policy” has also been interpreted strictly, in a manner parallel to the New York Convention.¹⁷³ Consequently, there is no contradiction between the requirements of Brussels I and those of the New York Convention in this respect.

It is important to remember, however, that the CJEU has also developed a conception of public policy based on norms of EU law, holding that certain of those norms are so essential to the EU itself, that where a Member State allows its courts to apply a public policy exception relating to domestic public policy, it must also apply one relating to EU public

¹⁷¹ Hess, Pfeiffer and Schlosser (2005), at 60-65.

¹⁷² van den Berg (1981); Fry (2009); Born (2014).

¹⁷³ Francq (2007), at p. 566.

policy under the “principle of equivalence” and the “principle of effectiveness”.¹⁷⁴ Moreover, the CJEU has explicitly applied this notion in the context of the enforcement of arbitral awards.

In *Eco Swiss*¹⁷⁵ the CJEU held that certain rules of EU competition law constitute part of the public policy of the EU, and consequently that an award which violates EU competition law can be annulled or refused enforcement on that basis.¹⁷⁶

In *Mostaza Claro*¹⁷⁷ the CJEU held that a national court seised of an action for the annulment of an arbitration award involving a consumer must determine whether the arbitration agreement constituted an “unfair term” under Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts, even if this objection was never raised by the consumer in the arbitration, and annul the award if it did.

The CJEU clarified in *Asturcom*,¹⁷⁸ however, that because the obligation to apply EU public policy was built upon the “principle of equivalence”, where a Member State court would not apply domestic public policy to refuse enforcement of an award, it was not obligated to do so under EU public policy.

Most recently, in *Katalin Sebestyén*,¹⁷⁹ in a request for a preliminary ruling under Article 267 TFEU, the CJEU held that an arbitration agreement in a consumer contract, which has “the object or effect of excluding or hindering the consumer’s right to take legal action or exercise any other legal remedy” can be denied enforcement even where the existence of the arbitration agreement, along with “general information on the differences between the arbitration procedure and ordinary legal proceedings”, was communicated to the consumer in “plain and intelligible” language.

The CJEU has, unfortunately not yet clarified the boundaries of EU public policy, and is instead approaching this question on a case by case basis. While such an approach allows for an considered evaluation by the Court, it also introduces considerable uncertainty in the arbitration context, as it is simply entirely unclear at the present time which provisions of EU law constitute part of EU public policy, and so will form a ground for the annulment of an arbitral award, a refusal to enforce it, or a refusal to enforce an arbitration agreement. Given the increasing range of topics addressed by EU law, clarity on this point is greatly needed.

Conclusions

Arbitration interacts with EU law in several ways. Although arbitral tribunals are not part of the judicial system of Member States and operate outside of the European area of justice, they interpret and apply EU law. Therefore, it is necessary to analyse the situations of potential conflict between the two legal orders.

Arbitral tribunals are not allowed to make references for preliminary rulings to the CJEU. Enabling arbitrators to apply for preliminary rulings would have the beneficial effect of ensuring a correct and consistent interpretation of EU law. Nonetheless, the CJEU has so far adopted a formalistic approach, concluding that arbitral tribunals do not qualify as “courts

¹⁷⁴ Bermann (2011), at 1201-2.

¹⁷⁵ *Eco Swiss China Time Ltd v Benetton International NV* (Case C-126/97) ECR I- I-3079

¹⁷⁶ Notably, however, arbitration itself is not seen as incompatible with EU competition law. Indeed, the European Commission has long required, since *Elf Aquitaine v Thyssen and Minol*, arbitration of disputes between private parties arising out of Commission requirements imposed when conditional merger clearance was granted pursuant to Council Regulation N° 4064/89 (now see Reg. EC no. 139/2004). (Benedettelli 2011 p. 593).

¹⁷⁷ *Mostaza Claro v Centro Móvil Milenium SL* Case (C-168/05) [2006] ECR I-10421

¹⁷⁸ *Asturcom Telecomunicaciones SL v Rodriguez Nogueira* (Case C-40/08) [2009] ECR I-9579

¹⁷⁹ *Katalin Sebestyén v Zsolt Csaba Kővári, OTP Bank, OTP Faktoring Követeléskezelő Zrt, Raiffeisen Bank Zrt* (Case C-342/13) [2014]

or tribunals of a Member State" within the meaning of Article 267 TFEU, since parties submit to arbitration voluntarily and arbitrators do not exert an authoritative power. One solution to this problem is for Member States to allow arbitral tribunals to ask the *juge d'appui* to make a preliminary reference on their behalf, as already provided for by Danish law.

Since arbitration is excluded from the scope of application of Brussels I, the same action can simultaneously be brought before an arbitral tribunal and a Member State court. This possibility of parallel proceedings entails the risk of a conflict between judgments, as demonstrated by the *West Tankers* case. The Recast Regulation partially clarifies the legal framework by defining the scope of application of the arbitration exclusion. However, parallel proceedings remain, in principle, possible. Future reforms could resolve this problem by partially including arbitration in the Brussels I system and providing that only the State courts at the seat of arbitration may decide whether the arbitration clause is valid. Whenever a different Member State court is seised of an action which is covered by the arbitration agreement, such Court would have to stay the proceedings if the defendant raised an objection based on the existence of the agreement and applied to the State court at the seat of the arbitration for declaratory relief as to the existence and validity of the arbitration agreement.

Public policy is another area of possible conflict between arbitration and EU law. Under Article V(2)(b) of the New York Convention, recognition and enforcement of an arbitral award can be denied in case of conflict with the public policy of the recognising jurisdiction. National courts have generally interpreted the public policy exception narrowly, in line with the pro-enforcement bias of the New York Convention. However, the CJEU has developed a partially different conception of public policy, based on norms of EU law: according to the Court, certain of those norms are so essential to the EU itself, that where a Member State allows its courts to allow a public policy exception relating to domestic public policy, it must also apply one relating to EU public policy under the "principle of equivalence" and the "principle of effectiveness". Moreover, the CJEU has explicitly applied this notion in the context of the enforcement of arbitral awards. Such an approach introduces considerable uncertainty, as it makes it difficult to determine which provisions of EU law constitute part of EU public policy, and so will form a ground for the annulment of an arbitral award, a refusal to enforce it, or a refusal to enforce an arbitration agreement. In light of this, the boundaries of the notion of EU public policy should be clarified.

Focus

(i) Exclusion of Arbitration from the Brussels I Regulation

Although arbitration is structurally similar to court litigation, it has always been excluded from the scope of application of the Brussels Convention and then of the Brussels I Regulation; the main reason for such an exclusion is to be found in the existence of the 1958 New York Convention, which effectively regulates the recognition and enforcement of arbitral agreements and awards. Therefore, Brussels I leaves Member States free to regulate the recognition and enforcement of arbitration agreements and awards autonomously, in accordance with their international obligations. Nonetheless, practice has shown the limits of this 'double track' system, as arbitration and court proceedings can and do interact and interfere with each other.

These interactions have contributed to a progressive restriction of the scope of the arbitration exclusion in the case-law of the Court of Justice of the European Union. In *West Tankers*,¹⁸⁰ the Court stated that ancillary court proceedings can be incompatible with the

¹⁸⁰ Case No C-185/07 Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers Inc [2009] ECR I-663.

Regulation even if they fall outside of its scope of application, inasmuch as they hinder the possibility for Member State courts to exercise their jurisdiction. In light of this, anti-suit injunctions were declared in conflict with the principle of mutual trust. The problem was made more complicated by the interpretation that *West Tankers* was subsequently given by State courts: in *National Navigation*,¹⁸¹ the England and Wales Court of Appeal concluded that a Member State court judgment affirming the jurisdiction of the State court was to circulate under Brussels I, even if rendered in breach of an arbitration agreement, because of the principle of mutual trust. This was considered a particularly undesirable effect of *West Tankers*, since it made it possible for any party to nullify the effects of an arbitration agreement by instituting proceedings before a Member State court.

The Recast Brussels I Regulation (Regulation 1215/2012) maintains the arbitration exclusion, but clarifies its scope in Recital 12. According to Paragraph 1 of Recital 12 the arbitration exclusion set forth in Article 1(2)(d) leaves Member States free to regulate the enforcement of arbitration agreements autonomously and in accordance with their international obligations under the New York Convention and other applicable international instruments.

Pursuant to Paragraph 2, a judgment ruling exclusively on the validity of an arbitration clause cannot circulate under the Recast Regulation. In this regard, the aim of the Recital is evident: a situation such as *National Navigation* could not occur any longer, as the foreign judgment would fall within the arbitration exclusion.

Paragraph 3 addresses the problem of Member State courts judgments ruling both on the arbitration agreement and on the merits of the dispute. The judgment on the merits can always circulate under Brussels I, even when the State court has also had to assess the existence and the validity of an arbitration agreement in order to affirm its jurisdiction. On the other hand, however, a conflicting arbitral award should in principle always prevail, in light of the prevalence of the New York Convention over the Regulation, expressly enshrined in Article 73(2). Nonetheless, uncertainties remain: it is not clear whether an arbitral award could be set aside or denied recognition and enforcement because of its conflict with an earlier court judgment. Moreover, it is not easy to determine whether an irreconcilable court judgment might be denied recognition and enforcement under Article 45 of the Recast Regulation, in light of the contents of Article 73(2).

Finally, Paragraph 4 of the Recital states that measures in support of arbitration are excluded from the scope of application of the Regulation. This is not likely to change the position of the Court of Justice as far as anti-suit injunctions are concerned: even before the Recast, the Court has never stated that Brussels I applies to these measures. Rather, the incompatibility with EU law stems from the fact that the State court proceedings which anti-suit injunctions aim at avoiding fall within the scope of the Regulation: from the point of view of the Court of Justice, therefore, nothing should change in relation to such measures.

(ii) Impossibility for arbitral tribunals to apply for preliminary rulings from the Court of Justice of the European Union

One of the most prominent issues of arbitration proceedings seated in the European Union is that, even when arbitral tribunals must apply EU law, unlike State courts they cannot apply for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union. Therefore, even when an arbitral tribunal is uncertain as to the correct interpretation to give to EU law, it cannot rely on direct guidance from the Court of Justice.

¹⁸¹ *National Navigation Co v Endesa Generacion SA (The Wadi Sudr)* [2009] EWCA Civ 1397; [2010] 1 Lloyd's Rep 193.

The case-law of the Court of Justice so far appears to exclude commercial arbitration tribunals from the scope of application of Article 267 on the ground that they do not qualify as 'courts or tribunals of a Member State', even when the seat of arbitration is a Member State.¹⁸²

In order to determine whether a body making a reference is a court or tribunal, the Court of Justice takes into account a wide number of factors, such as whether the body is established by law, whether it is temporary or permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent.¹⁸³ According to the Court, arbitral tribunals cannot be considered courts or tribunals within the meaning of Article 267 TFEU, albeit fulfilling many of the aforementioned requirements.

The exclusion of arbitral tribunals from the scope of application of Article 267 TFEU has particularly problematic consequences in the field of intra-EU investment arbitration. In this context, arbitral tribunals often need to interpret provisions of the applicable investment treaty and provisions of EU law in a harmonising way, in order to avoid situations of explicit conflicts between the two legal orders. Therefore, it would be particularly useful for the tribunal to apply for a preliminary ruling before the Court of Justice. In some cases, this could be possible indirectly, through the involvement of the State court of the seat of arbitration, which could forward the preliminary question to the Court performing its supporting functions. However, this possibility depends on several factors, such as the contents of the applicable arbitration law of the seat.

(iii) EU Public Policy

Arbitral awards can be set aside at the seat of arbitration or denied recognition and enforcement under the New York Convention if they run contrary to public policy. However, the concept of public policy has been traditionally interpreted restrictively, as to exclusively encompass the core principles and value of a certain legal system. In all cases where the award is not manifestly irreconcilable with these basic elements, it is binding on the parties and it should, in principle, circulate without limitations. However, in the European Union, the Court of Justice has put forth a more extensive notion of public policy.

The problem of the relationship between arbitration in Europe and public policy stems from the question whether competition law disputes are arbitrable. It is clear that this kind of disputes involves economic interests of the parties; however, competition law is mandatory in nature and therefore limits the scope of private autonomy. Within the European Union, the role of competition law is particularly important, as their enforcement is fundamental in order to ensure the correct functioning of the common market.

¹⁸² Case 102/81 *Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG & Co. KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co. KG*. [1982] ECR 1095; the same approach is followed in Case C-125-04 *Guy Denuit and Betty Cordenier v Transorient – Mosaïque Voyages et Culture SA* [2005] ECR I-923. But see Case C-555/13 *Merck Canada Inc.*, in which the CJEU accepted a preliminary reference from a government-established arbitration tribunal.

¹⁸³ These requirements have been set forth in Case C-516/99 *Walter Schmid* (2002) ECR I-4573; Case C-54/96 *Dorsch Consult Ingenieuresellschaft mbH v Bundesbaugesellschaft Berlin mbH* (1997) ECR I-4961; Case C-111/94 *Job Centre Coop. ARL*. (1995) ERC I-3361; Case C-393/92 *Municipality of Almelo and others v NV Energiebedrijf Ijsselmij* (1994) ECR I-1477; Case 109/88 *Handels- og Kontorfunktionærernes Forbund i Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss* (1989) ERC 3199; Case 14/86 *Pretore di Salò v Persons unknown* (1987) ECR 2545; Case 61/65 *G. Vaassen-Göbbels v Management of the Beambtenfonds voor het Mijnbedrijf* (1966) ECR 377.

It is now commonly accepted that competition cases are arbitrable: this conclusion was first reached in the United States in the famous *Mitsubishi* case.¹⁸⁴ In the European Union, a partially similar conclusion was reached by the Court of Justice in *Eco Swiss*;¹⁸⁵ however, in this case, the Court also stated that the arbitral tribunal has a mandatory duty to respect the contents of EU competition law. As a result, according to the reasoning of the Court, if the award disregards or misapplies a fundamental element of EU law, it can be set aside on grounds of public policy.

This conclusion is inconsistent with the traditional approach to public policy and creates some problems as far as the finality of the award is concerned, since it allows broadly for a challenge on point of law. Therefore, the case-law of the Court of Justice partially overrules the consolidated and generally accepted 'permissive' interpretation of the public policy requirement set forth in Article V(2)(b) of the New York Convention.

2.3.2. Consumer Arbitration

Arbitration has many advantages and has become highly integrated into the settlement of commercial disputes around the world.¹⁸⁶ The use of arbitration in the context of consumer disputes, however, is far more controversial. Arbitration fundamentally receives its legitimacy from the fact that it is based on the consent of the parties, and from an assurance that the equal control of both parties over the procedures to be used in an arbitration substantially limits the risk that one party will be treated unfairly. Both of these elements of the legitimacy of arbitration, however, come into question in the context of consumer disputes.

Consumer contracts are overwhelmingly adhesion contracts, with the consumer simply presented with the terms of the agreement, which he or she may accept or reject, but may not negotiate. If such contracts are only used occasionally in an industry, or vary in their contents, then consumers have a realistic option of rejecting the proposed contract, and finding better terms elsewhere. However, when any industry adopts adhesion contracts as a standard means of doing business, and where those contracts contain identical or near-identical provisions on important points, consumer choice becomes illusory.

With respect to arbitration the one-sided nature of such contracts becomes particularly problematic, as the effective elimination of the consumer's ability to alter the terms of a contract containing an arbitration agreement means that the consumer ultimately has no control over the procedures to be used in any resulting arbitration. This creates a serious problem, as although courts are bound by formally adopted rules of civil procedure, there are no strict constraints on how an arbitration can operate. As a result, the business party is put in the position of being able to effectively impose arbitration on the consumer, and then dictate the procedures used in that arbitration. The risk this situation creates for the fairness of consumer arbitration is clear.

Questions about the legitimacy and fairness of consumer arbitration have been raised in both the United States of America and the European Union, and the two jurisdictions have

¹⁸⁴ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614 (U.S. 1985).

¹⁸⁵ Case C-126-97 *Eco Swiss China Time Ltd v Benetton International NV*. [1999] ECR I-03055.

¹⁸⁶ The Authors benefited substantially from discussions of consumer arbitration at the Brunel Law School Roundtable on Consumer Arbitration, held on 03 September 2014. Participants at the workshop included Richard Alderman (University of Houston, United States of America), Immaculada Barral-Viñals (University of Barcelona, Spain), Tony Cole (Brunel University, United Kingdom), Pablo Cortes (University of Leicester, United Kingdom), Jim Davies (University of Northampton, United Kingdom), Monika Jagielska (University of Silesia, Poland), Caroline Mitchell (Financial Ombudsman Service, United Kingdom), Zdeněk Nový (Masaryk University, Czech Republic), Christine Riefa (Brunel University, United Kingdom), Adam Samuel (Independent Practitioner, United Kingdom), Hans Schulte-Nölke (Osnabrück University, Germany), Karin Sein (University of Tartu, Estonia), Barbara Warwas (Brunel University, United Kingdom).

answered in fundamentally different ways. Federal law in the USA is overwhelmingly supportive of arbitration, and this “pro-arbitration” approach has also been applied in the context of consumer disputes, with very few restrictions being placed on consumer arbitration. By contrast, the European Union has been much more cautious, specifically restricting consumer arbitration agreements, although not banning them completely.

Definition of Consumer Arbitration

The term “arbitration” is used in a number of contexts, with respect to a wide range of procedures, and this can give rise to some confusion regarding what does and does not constitute a “consumer arbitration”. In the United Kingdom for example, “arbitration” was a term originally used to describe small claims schemes in county courts.¹⁸⁷ “Arbitration” is also the term used to describe the system adopted for the resolution of consumer disputes in Spain, the “Sistema Arbitral de Consumo”.¹⁸⁸ Each of these procedures, however, is ultimately controlled by the State, and so is fundamentally different than arbitration as it is discussed throughout this Study. Moreover, because each of these is a procedure controlled by the State, they are less likely to give rise to the concerns discussed above, as the State can mandate that they function in ways that ensure consumers are properly protected.

There are currently around 750 ADR schemes in operation in Europe, but very few are properly referred to as arbitration. Instead, these schemes are overwhelmingly forms of conciliation, mediation, an ombudsman service,¹⁸⁹ or a variant of those forms of dispute resolution. Yet more schemes adopt a graduated approach, in which arbitration is indeed offered, but only when other methods have failed to resolve the dispute.¹⁹⁰

Consumer arbitration, for the purpose of this Study, refers to a mode of alternative dispute resolution, not integrated into or directly controlled by national courts, that uses an independent third party to deliver a binding decision in a dispute between a business and a consumer. Importantly, the decisions of the arbitrator will be legally binding on both parties, a situation distinguishing arbitration from some other forms of consumer ADR, which involve a third-party decision-maker and deprive the business party of the right to go to court, but allow the consumer to go to court if he/she is unhappy with the decision received.

In this respect consumer arbitration resembles a court procedure. However, unlike a court judgement in a consumer dispute, the decision in a consumer arbitration will rarely be able to be appealed. Moreover, while courts are bound to apply the law, arbitrators can be given permission in an arbitration agreement to base their decision on standards other than strict application of the law. As the business party will likely have drafted the arbitration agreement without the participation of the consumer, this potentially enables less honest businesses to circumvent consumer protection legislation.

¹⁸⁷ Gordon (1984), at 38.

¹⁸⁸ Reich (2014), at 21. The ‘Sistema Arbitral de Consumo’ provides for arbitration panels (colegio arbitral) established at national and regional level. Spanish law requires consumer arbitration to be conducted by certain recognised consumer arbitration bodies. For more on the Spanish system, see Strong (2013); Barral-Vinals (2013).

¹⁸⁹ For an example of a successful ombudsman model in the UK, see FOS <www.financial-ombudsman.org.uk>. The Ombudsman was set up under the Financial Services and Market Act 2000. Businesses are bound by the decisions of the Ombudsman whereas consumers remain free to go to court. The system deals with many consumer disputes and offers an excellent model for consumer dispute resolution. However, it only functions because it is backed by a strong regulatory backdrop and could not necessarily be exported across the spectrum of consumer disputes with the same degree of success.

¹⁹⁰ Hodges (2014).

Legality of pre-dispute arbitration agreements

An arbitration agreement can be reached both before a dispute arises, and afterwards. It is, however, pre-dispute arbitration agreements that raise particular concerns in the context of consumer arbitration, as the consumer is unlikely to have thought seriously about dispute resolution at this point. Consequently, hence even if the consumer is aware that he/she is entering into an arbitration agreement, he/she will often not genuinely understand the consequences of doing so.¹⁹¹ Moreover, whereas in commercial agreements between two businesses, each party is likely to pay close attention to the contents of the agreement into which they are entering, consumers are known to rarely do this, and will therefore often enter into arbitration agreements without even knowing that they have done so. The remainder of this section will compare the approaches to the enforceability of pre-dispute arbitration agreements adopted in the United States and the European Union.

The United States

As already mentioned, the United States Supreme Court has adopted a strongly pro-arbitration stance, and has not hesitated to apply that stance in the context of consumer arbitration.¹⁹² While there are a number of prominent U.S. Supreme Court decisions in this context, one illustrative decision is *Buckeye Check Cashing Inc v Cardegna*,¹⁹³ in which the Supreme Court affirmed the validity of an arbitration clause in a payday lending agreement, even though that agreement was itself void under applicable consumer protection legislation.¹⁹⁴

In reversing the decision of the Supreme Court of Florida, and enforcing the arbitration agreement, the Court appealed to the doctrine of “separability”, a standard feature of arbitration jurisprudence in many jurisdictions around the world. According to the doctrine of separability, an arbitration clause is ultimately a separate agreement from the contract in which it is contained. As a result, the invalidity of the contract does not mean that an arbitration agreement included in that contract is itself also invalid. In turn, having established the survival of the arbitration agreement, the Court then appealed to the doctrine of “competence-competence”, another standard feature of arbitration jurisprudence around the world. According to the doctrine of competence-competence, it is for an arbitrator, not a court, to decide in the first instance whether or not an arbitration agreement is binding, even if the contract containing the arbitration agreement is, as a matter of law, itself not binding.

Both separability and competence-competence are important arbitration doctrines, and indeed are essential for arbitration to be effective. However, the problematic nature of their use in this context is clear, as it creates a situation in which the consumer is forced to attempt to convince an arbitrator that the arbitration agreement is not binding, in a procedure potentially designed by the business counterparty. While it is formally possible for a court subsequently to overrule an arbitrator’s decision that the consumer was obligated to arbitrate, as a practical matter such a decision will be extremely rare. As a result, merely through the application of the standard arbitration doctrines of separability and competence-competence in the consumer context, the Supreme Court has created a

¹⁹¹ Hörnle (2006).

¹⁹² This position is enshrined in a long line of commercial and consumer cases recognising: Arbitration as just another forum (*Scherk v Alberto-Culver Co.* (1974) 417 U.S. 506, 519 (1974)); a presumption in favour of arbitration (*Moses H. Cone Mem'l Hosp. v Mercury Constr. Corp* 460 U.S. 1 (1983) and *Gilmer v Interstate/Johnson Lane Corp* 500 U.S. 20 (1991)); The favour for arbitration clauses goes further with the recognition of the use of arbitration as a forum for class action (*Green Tree Financial v Bazzle* 539 U.S. 444 (2003)).

¹⁹³ *Buckeye Check Cashing Inc v Cardegna*, 546 U.S. 440 (2006).

¹⁹⁴ The validity of arbitration clauses in consumer contracts is recognised by the US Supreme Court and can be traced back to 1983 and the case of *Moses H. Cone Mem'l Hosp. V Mercury Constr. Corp.* (460 U.S. 1 (1983)).

situation in which consumer protection laws can be avoided by any business dishonest enough to create an unfair arbitral procedure. Since *Buckeye* the U.S. Supreme Court has continued to expand its pro-enforcement approach to consumer arbitration.¹⁹⁵

A primary cause of the difficulties currently being faced in the USA with respect to consumer arbitration arises from the fact that U.S. Federal law draws no distinction between different types of arbitration. Consequently, doctrines that have been developed in the context of commercial arbitration are then applied in the very different context of consumer arbitration. Similarly, any attempt made to protect consumers in the context of consumer arbitration will then be imported into commercial arbitration, where the need for one party in a transaction to be protected from the greater power of the other is far less clear. The structure of U.S. Federal arbitration law, then, creates a situation in which either consumer arbitration or commercial arbitration can be run appropriately, leaving the other to suffer the consequences, or in which a mixture can be adopted that ensures neither functions well.

The European Union

In contrast to the approach adopted in the USA, the EU has taken a more restrictive approach to consumer arbitration, although policies on the admissibility of pre-dispute arbitration clauses vary from one Member State to another. The fairness of consumer arbitration clauses within European Union Member States is controlled by domestic legislation that derives from each State's implementation of the Unfair Terms Directive (Directive 93/13/EC). In the United Kingdom, for example, sections 89 and 91 of the 1996 Arbitration Act control the use of consumer arbitration agreements, differentiating between agreements above and below a set amount, currently £5,000. Arbitration agreements in consumer contracts worth less than £5,000 are automatically void, while those in consumer contracts worth more than £5,000 are subject to a test with respect to their fairness.¹⁹⁶ In Sweden, by contrast, section 6 of the Swedish Arbitration Act entirely invalidates pre-dispute arbitration agreements regarding the sale of goods and services for private use. In Germany, on the other hand, pre-dispute arbitration agreements in consumer contracts are enforceable if they are included in a separate document from the remainder of the agreement, or are included in a fully notarized contract.¹⁹⁷ A similar formal requirement for a separate document containing the agreement to arbitrate exists in Estonia and in the Czech Republic. In Spain pre-dispute arbitration clauses are acceptable providing they refer to the statutory arbitration scheme referred to above (*Sistema Arbitral de Consumo*).

EU law also potentially impacts on the possibility of "collective" consumer arbitration, a further topic of high contention in the USA. The EU's stance on the collective arbitration of disputes is now guided by Commission Recommendation 2013/396/EU,¹⁹⁸ which "puts forward a set of principles relating both to judicial and out-of-court collective redress that should be common across the Union, while respecting the different legal traditions of the Member States. These principles should ensure that fundamental procedural rights of the parties are preserved and should prevent abuse through appropriate safeguards."¹⁹⁹

¹⁹⁵ See, for example, *AT&T Mobility LLC v Concepcion*, 131 S Ct 1740 (2011), where the Supreme Court held that, at least for class action waivers in arbitration clauses, the Federal Arbitration Act pre-empts an independent unconscionability analysis under state law.

¹⁹⁶ Section 5 (1) of the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR 1999).

¹⁹⁷ Schiavetta (2004), at 2.1 in fine. Note that in Germany, the court provisions for consumer disputes are deemed sufficient and as a result very few binding arbitration schemes exist.

¹⁹⁸ Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, [2013] OJ L201/60-65.

¹⁹⁹ Recital 13.

Recommendations 25 to 28 specifically deal with collective alternative dispute resolution and settlements. However, it should be noted that these articles only make reference to Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters. This may be interpreted as implicitly excluding collective arbitration from coverage by the Recommendation.

The CJEU has also adopted decisions protective of consumers. In the case of *Mostaza Claro v Centro Movil Milenium SL*,²⁰⁰ for example, Mrs Mostaza Claro's mobile phone contract with a Spanish operator contained an arbitration clause. When Mrs Mostaza Claro failed to comply with the minimum subscription period, the mobile phone company initiated arbitration proceedings. Mrs Mostaza Claro was given ten days to refuse arbitration proceedings and was told that if she refused she could bring proceedings in court. She nonetheless took the dispute to arbitration, raising no objections during the arbitration regarding the validity of the arbitration clause. After delivery of the arbitral tribunal's decision, Mrs Mostaza Claro finally objected to the validity of the arbitration agreement, arguing before a Spanish court that it was null and void. The court referred the question to the CJEU for a preliminary ruling on the interpretation of EU law.

The CJEU held that the Unfair Terms Directive must be interpreted to mean that any national court seized of an action for annulment of an arbitration award must determine whether the arbitration agreement underlying the award is void under the Unfair Terms Directive. Moreover, the award must be annulled if the arbitration agreement contains unfair terms, even if the consumer did not challenge the validity of the arbitration agreement during the arbitral proceedings. According to the CJEU, any other interpretation of the Directive would undermine the protection the Directive was intended to establish.

In its subsequent *Asturcom*²⁰¹ ruling the CJEU went even further, holding that if the law of a Member State allows arbitral awards to be refused enforcement on public policy grounds, then any court of that State asked to enforce an award arising from a consumer arbitration must, on its own motion, evaluate whether the arbitration agreement is "unfair" under the Unfair Terms Directive. If so, it must refuse to enforce the award. More broadly, the *Asturcom* ruling allows consumers to challenge an arbitral award on the ground that any contractual term applied by the arbitral tribunal when reaching the award was unfair under the Unfair Terms Directive, even if the arbitral agreement itself was not unfair under the Unfair Terms Directive.

Nonetheless, despite the existence of these restrictions in both EU Law and the law of Member States, arbitration clauses are still regularly included in consumer contracts. In most European jurisdictions, of course, such clauses are not inherently unenforceable. However, precisely this flexibility regarding the enforcement of arbitration clauses in the European Union raises significant risks that they will be used inappropriately. Few consumers, after all, are sophisticated enough in consumer protection law to know when a consumer arbitration agreement is or is not binding.²⁰² Consequently, when instructed by a business that they are obligated to arbitrate their dispute, rather than take their dispute to court, many consumers will simply accept what seems to be the clear language of the contract they have signed, and either take their dispute to arbitration, or just drop their complaint. This creates an incentive for less honest businesses to include arbitration clauses in their contracts, even if they are aware that the clause will probably not be enforceable.

²⁰⁰ C-168/05 [2006] All ER (D) 322.

²⁰¹ C-40/08 *Asturcom Telecomunicaciones v Christina Rodrigues Noguera* [2009] ECRI-9579.

²⁰² For a study of arbitration clauses contained in online auction contracts, see Riefa (2015), at chapter 4.

Control of post-dispute arbitration agreements

As already noted, consumers may enter into arbitration agreements after a dispute has arisen, as well as before. Post-dispute arbitration agreements are generally seen as less problematic than pre-dispute arbitration agreements, as the consumer is assumed to be more aware of what he/she is agreeing to do. Nonetheless, some Member States have still put in place certain safeguards, as post-dispute arbitration agreements are not completely without risk in the consumer context.²⁰³

Dishonest businesses may, for example, convince consumers to enter into post-dispute arbitration agreements through a misleading presentation of the potential benefits of arbitration over litigation. Consumers may, for example, be enticed by promises of the “fast and cheap” nature of arbitration compared to litigation in courts. Consumers may, however, not fully understand that by agreeing to arbitrate their dispute they thereby lose their right subsequently to go to court. Similarly, consumers are unlikely to appreciate the power the procedural flexibility of arbitration gives to parties – potentially allowing an unscrupulous business to design an arbitral procedure that takes away many of the procedural protections the consumer would have had in court. Moreover, as has become clear in the United States, the fact that it is the business, and not the consumer, which is likely to be the repeat player in arbitration can create an incentive for less professional arbitral institutions or arbitrators to deliver decisions favourable to the business, in order to ensure further work.

Procedural aspects and limitations of Directive 2013/11 in protecting consumers effectively

In recent years much activity at the European Union has revolved around creating trustworthy alternative forms of dispute resolution.²⁰⁴ This activity has recently culminated in the adoption of the Directive on Alternative Dispute Resolution for Consumer Disputes (ADR).²⁰⁵ While it is not entirely clear whether or not the ADR applies to arbitration, it will be discussed here because of the possibility that it does.

The ADR requires that when domestic and cross-border consumer disputes are submitted to ADR institutions – including those handled by trade associations – they must respect the principles of fairness, transparency, legality (procedural and substantive) and protection of fundamental rights (including privacy and data protection), and the consumer’s right to judicial remedies must not be compromised. It is on this last point that consumer arbitration is most problematic, because traditional rules of arbitration law prevent parties who have entered into an arbitration agreement taking their dispute to court.

The Directive applies to “procedures for the out of court resolution of domestic and cross-border disputes concerning contractual obligations stemming from sales contracts and service contracts between a trader established in the Union and a consumer resident in the Union through the intervention of an ADR-entity which proposes or imposes a solution or brings the parties together with the aim of facilitating an amicable solution.”²⁰⁶ Arbitration

²⁰³ This is for example the case in Germany where agreements need to be formalised and signed by the parties according to Art 1029/1031 ZPO.

²⁰⁴ For a detailed outlook, see Hodges, Benöhr and Creutzfeldt-Banda (2012). The main building blocks include: Recommendation 98/257/EC on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes [1998] OJ L155/31; Recommendation 2001/310/EC on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes [2001] OJ L109/56-61; Council Resolution of 25 May 2000 on a Community wide network of national bodies for the extra-judicial settlement of consumer disputes [2000] OJ C155/1.

²⁰⁵ Directive 2013/11/EU on Consumer ADR [2013] L 165/63. Although para 29 of the Directive initially suggests that arbitration is not encompassed within the purview of ADR, Art 2(2) does not specifically exclude it.

²⁰⁶ Article 2(1) ADRD.

is a procedure that “imposes” a solution and thus potentially falls within the scope of the ADRD.²⁰⁷

Article 6 ADRD on expertise, independence and impartiality requires that persons in charge of an ADR proceeding are remunerated in a way that is not linked to the outcome of the procedure, and also requires that any conflicts of interest be disclosed. In case of conflicts, procedures must be implemented to replace the person concerned, submit the dispute to another entity or at the very least inform parties of the existence of the conflict of interest, in which case the procedure can only continue if the parties do not object.

This rule is far from unproblematic, as what constitutes a conflict of interest is not defined.²⁰⁸ Further, while repeated appointments of a particular arbitrator by a particular business might be found to create a conflict of interest, the mere fact that an arbitrator knows that the business party will be a ‘repeat player’, while the consumer will not, can create an incentive for less professional arbitrators to deliver business-friendly decisions, thereby increasing the likelihood that they will be appointed by a range of business parties.²⁰⁹ Moreover, the ability of the business party effectively to design the arbitral procedure creates the risk that a less honest business will be able to ensure, or at make far more likely, the appointment of arbitrators known to hold business-friendly interpretations of the law, without any obvious conflict of interest becoming apparent.

Although the ADRD requires that ADR entities operate transparently,²¹⁰ and that they regularly produce information regarding the procedures they have administered,²¹¹ few consumers will have the inclination or the ability to sieve through such data and interpret it meaningfully. Consequently, even where the consumer formally has a choice regarding which arbitral institution to use, they are unlikely to make such a selection through an informed decision. Short of using legal representation from a qualified professional, then, and thereby adding significantly to the costs of arbitration, consumers are likely to always be at a disadvantage in any arbitral process into which they enter with a business.

Even more problematically, there is no obligation on the part of a business party to incorporate into the arbitration agreement an ADR body from the list of accredited entities under the ADRD. As a result, consumers may be left without any guarantees as to the quality of the arbitral procedure to which they are agreeing.

A further problem exists in that the ADRD only applies to disputes in which the consumer is the plaintiff and not when the trader initiates arbitral proceedings.²¹² It will, therefore, not cover all consumer arbitrations, including particularly problematic situations such as when consumers are brought to arbitration as a means of forcing payment of debts.

The ADRD does include some important protections, however, including the power granted to Member States under Article 2(4) to “determine whether ADR entities established on

²⁰⁷ Note however that this is the same wording that was contained in Directive 2008/52/EC of 21 May 2008 on certain aspects of mediation in civil and commercial matters. Whilst this Directive did not concern arbitration, the Recommendation which precedes it also applies to procedures leading to the settlement of disputes through the intervention of a third party, who ‘proposes or imposes’ a solution. The Recommendation shows strong support for arbitration of consumer disputes as a means to address the disproportion between the economic value at stake and the cost of judicial settlement characteristic of consumer disputes (Recital 3). One interpretation may be to consider that the resolution method the legislator had in mind did not include arbitration in its classical sense. Yet, experts attending the Brunel Law School roundtable on Consumer Arbitration on 03 September 2014 all agreed that, although this may be an unintended consequence, the wording of the ADRD does encompass ‘arbitration’ within its scope.

²⁰⁸ On this point, in the context of commercial arbitration, see the IBA Guidelines on Conflict of Interest in International Arbitration that could serve as a basis for best practices in consumer arbitration.

²⁰⁹ Menkel-Meadow (1999).

²¹⁰ Article 7 ADRD.

²¹¹ Article 19 ADRD.

²¹² Article 2(2)(g) ADRD.

their territories are to have the power to impose a solution”, thereby allowing States to preclude certain institutions from administering consumer arbitrations. In addition, under Article 10(1) ADRD, pre-dispute agreements are not binding on consumers if they have the effect of depriving the consumer of his or her right to bring an action before the courts. As any arbitration agreement does this, the ADRD arguably eliminates the possibility of binding pre-dispute arbitration agreements. However, as already noted, it is not yet clear if indeed the ADRD applies to arbitration.

The ADRD, then, even if applicable in the context of arbitration, has substantial weaknesses as a means of addressing the risks involved in consumer arbitration. The restrictions incorporated into Articles 2 and 10, however, if applied in the context of arbitration, would represent a substantial tightening of consumer arbitration law across the European Union.

Conclusion

In many ways arbitration is an ideal form of consumer dispute resolution, as its flexibility allows the procedure to be designed to fit the dispute, enabling a cheaper process where the amount in dispute is small, a faster process where time is important, and the appointment of specialist consumer arbitrators, rather than generalist judges. This same flexibility, though, is precisely what undermines the usefulness of arbitration in the consumer context.

Consumer arbitration agreements are rarely entered into by the consumer with anything truly approaching voluntariness. Moreover, even when the consumer does voluntarily consent to arbitration, this consent is very rarely informed. As a result, the business party to a consumer arbitration agreement is placed in the position of being able to decide in advance on the details of the arbitral procedure, and effectively impose them on the consumer. Many businesses, of course, approach consumer arbitration with entirely honest intentions, and many arbitrators involved in consumer arbitrations undertake their work with the highest of integrity. This is, however, never going to be true of all businesses or all arbitrators, and the potential cost to consumers of an unfair arbitral process is substantial.

There are, then, good reasons to conclude that the enormous flexibility of arbitration, when combined with the power and knowledge imbalances inherent in the consumer context, simply make mutually binding arbitration inappropriate as a mechanism for the resolution of consumer disputes. At its best, arbitration can function as a fair and effective mechanism for the resolution of consumer disputes, but it is simply too easy for less scrupulous businesses to ensure that an arbitral process does not function fairly and effectively.

This does not mean, though, that there is no place for consumer arbitration in the resolution of consumer disputes. Where courts or ombudsmen are slow or ineffective, for example, the possibility of taking a dispute to arbitration can be enormously important for consumer protection. Arbitration must, however, be an option for the consumer to exercise, rather than something to which the consumer can be bound by a business.

One potential solution then, is to grant consumers an inalienable option to reject any arbitration agreement into which they have entered, prior to arbitral proceedings commencing. Moreover, in recognition of the fact that few consumers will truly understand arbitration until they have actually experienced it, consumers should also have the right to terminate an arbitral procedure, and take the dispute to court, at any point prior to the award being delivered – with the requirement that they must then share equally any costs, but not attorneys fees, incurred during the arbitration. Rules such as these, while ensuring that consumers have genuinely consented to any arbitration in which they have participated, will also create an incentive for those businesses interested in arbitration as a legitimate dispute resolution mechanism to ensure that the procedures they offer to

consumers are at least as fair and efficient as domestic courts – something that arbitration should always be.

Focus

(i) Consumer arbitration and consumer ADR: terminology

Consumer arbitration is not an isolated form of alternative dispute resolution (ADR) for the resolution of business-to-consumer ('B2C') disputes. Rather, the resolution of consumer disputes has developed its own distinct architecture and pathways, separate from courts and other forms of ADR.

In order not to miss the bigger picture, it is crucial to distinguish between different ADR schemes that were developed within the EU (and globally) in the context of B2C disputes. In addition to arbitration, the following ADR techniques should be examined here: (1) in-house complaints procedures, (2) mediation/conciliation, (3) adjudication, and (4) various types of ombudsman schemes.²¹³

In-house complaints procedures involve the consumer making a complaint to the trader's internal complaint mechanism. It is usually a requirement of external consumer dispute resolution schemes that this must be done before the consumer may access any external ADR scheme at a later stage.

Mediation/Conciliation entails the work of a neutral subject, who assists the parties in reaching a settlement on agreed terms.

Adjudication resembles arbitration in that it involves a third party who reaches a decision on the dispute between the parties, rather than helping the parties to reach agreement, but it differs from arbitration in that the adjudicator's decision is not binding on the parties. However, in a number of consumer dispute resolution schemes, traders indicate in advance that they will accept the outcome of the adjudication process.²¹⁴

Finally, an ombudsman mechanism involves the use of an independent and impartial intermediary, who is charged with hearing and addressing complaints. Ombudsman schemes combine various alternative techniques at different stages of dispute resolution, such as fact-finding at the outset of a dispute, and mediation and adjudication when examining the complaint.²¹⁵ In some ombudsmen schemes, the outcome is not binding on either trader or consumer (although, as with adjudication, traders sometimes agree to accept the result in advance), and in other schemes the consumer is free to accept or reject the decision, and if accepted the decision will be binding on the trader. The ombudsman model—in its different forms—is a particularly effective consumer dispute resolution technique, since it includes functions of extensive consumer advice, as well as aggregation and publication of claims data for regulatory purposes.

(ii) Diversity of ADR models across the EU and within the Member States

Today, there are approximately 750 ADR schemes for consumer disputes across the EU. Different Member States have adopted diverse ADR models for consumer disputes, often reflecting the specific ADR culture that has developed within a particular jurisdiction. For example, in Spain, arbitration has been widely adopted in many areas of consumer law, but operates alongside mediation and conciliation.²¹⁶ By comparison, in the Scandinavian

²¹³ Mapping UK consumer redress. A summary guide to dispute resolution systems (Office of Fair Trading, May 2010).

²¹⁴ Hodges, Benöhr & Creutzfeldt-Banda (2012).

²¹⁵ Hodges, Benöhr & Creutzfeldt-Banda (2012).

²¹⁶ Hodges, Benöhr & Creutzfeldt-Banda (2012).

countries the prevailing ADR model for the resolution of B2C disputes involves consumer complaints boards that issue non-binding recommendations.

(iii) Validity of pre-dispute arbitration clauses in consumer contracts in the EU

One important issue concerning consumer arbitration in the EU involves the question of the validity of standard, pre-dispute arbitration agreements contained in consumer contracts. There is a considerable clash between the approaches to pre-dispute arbitration agreements involving consumers in the US and in the EU. Whereas in the US arbitration agreements concluded before a dispute has arisen are usually acceptable and valid, the EU, due to the requirement not to deny access to the courts under ECHR article 6, and the specific EU regime on consumer protection, restricts the validity of pre-dispute arbitration clauses binding upon consumers. This does not mean that pre-dispute arbitration clauses are *per se* invalid under EU law. Rather, their validity will be examined on a case-by-case basis with regard to the relevant regime on consumer arbitration (when applicable) under the national law of the country that applies to a transaction involving the consumer. Hence, consumer arbitration clauses will likely be held valid in international contracts involving consumers in France because of the non-applicability of the domestic restrictions regarding consumer arbitration to international cases in this jurisdiction.²¹⁷ In turn, under the UK Arbitration Act of 1996, pre-dispute arbitration clauses in consumer contracts will be unfair and invalid only in low value claims (with the amount at stake not exceeding £5,000).

In practice, however, it can be expected that most pre-dispute arbitration agreements involving consumers will be held to be unfair within the EU.²¹⁸

The EU legislation concerning arbitration agreements in consumer contracts is focused on the need to promote access to justice by allowing consumers to exercise their right to fair trial under Article 6 of the European Convention of Human Rights. Article 3 of the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts creates a presumption regarding the invalidity of unfair arbitration clauses in consumer contracts.²¹⁹ The purpose of this provision, and of the Directive in its entirety, is to protect the interests of weaker parties to contracts involving professionals, and to eliminate potential abuse of consumers through the use of contracts of adhesion.

In other words, the validity of consumer arbitration agreements is treated as a matter of public policy, focusing particularly on the concern that private arbitrators will not apply consumer law correctly.²²⁰

Consumers may also find themselves in a position to question the validity of an arbitration clause after the issuance of an award. This was the case of Ms. Mostaza Claro in the prominent judgment of the CJEU in Case C-168/05 *Elisa Marioa Mostaza Claro v Centro Móvil Milenium SL* [2006] ECR I-10421. In the judgment in question the ECJ stated that a national court seized of an action for the annulment of an arbitral award must interpret whether an arbitration agreement constitutes an unfair term of the contract and is therefore null and void, regardless of whether the consumer has or has not questioned the arbitration agreement before an arbitral tribunal constituted to decide on the arbitration case.

²¹⁷ See: *Société V 2000 v. Société Project XJ 220 ITD et autre*, Rev. Arb. p. 245 (1996), comment Charles Jarroson.

²¹⁸ Cortes, 2014.

²¹⁹ OJ L 95, 21.4.1993.

²²⁰ Cortes (2014); CJEU decision of 27 June 2000 in Joined Cases C-240-244/98, NJ 2000, 730, *Océano Grupo Editorial SA v Roció Murciano Quintero et. al.*

Indeed, in Case C-40/08 *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira* [2009] ECR I- 9579, the CJEU confirmed that a national court faced with the enforcement of the arbitral award issued in the absence of the consumer must on its own motion interpret the validity and fairness of the consumer arbitration clause under the provisions of the Directive 93/13/EEC on unfair terms in consumer contracts, if the national court has all legal and factual instruments necessary for making such determination.

These cases represent an important variation from the standard rules applied to the challenge of arbitral awards, in accordance with which failure to object to the arbitral tribunal that the arbitration agreement is invalid, will be treated by courts as constituting a waiver of the argument. As a result, the court will refuse to hear arguments concerning the validity of the arbitration agreement. The doctrine adopted in *Mostaza Claro*, then, constitutes an important protection for consumers.

2.3.3. Online Arbitration

Questions regarding the development of online arbitration in the European Union fall within a broader discussion of the effectiveness of, and challenges to, alternative dispute resolution (ADR) and online dispute resolution (ODR) mechanisms that has been ongoing in Europe for the past 20 years, particularly in the context of business-to-consumer (B2C) transactions.²²¹ Indeed, ODR has been continuously promoted within the EU, with the most recent instruments involving the Directive 2013/11/EU on Consumer ADR and the Regulation No. 524/2013 on Consumer ODR of 21 May 2013.²²² Additionally, both the European Commission and the European Parliament have been actively engaged in various ODR projects, including but not limited to the following initiatives: (1) financing different ODR providers (e.g. ECODIR, e-arbitration-t), (2) introducing trust mark schemes (i.e. Web Trader), and (3) encouraging and sponsoring collaborative research projects on ODR (e.g. Joint Research Centre).²²³

However, online arbitration, rather than the broader category of ODR, is a relatively new phenomenon within the EU legal order and it raises a number of questions related to its interplay with national arbitration laws, on one hand, and both the international and European frameworks designed for traditional arbitration, on the other hand.

Features of Online Arbitration

"Online arbitration" is a difficult term, as it can be understood to refer to a substantial range of activities, from arbitration schemes in which all aspects of the proceedings are conducted online, including hearings, through simpler dispute resolution schemes in which the disputing parties merely upload documents onto a website and then receive a decision from an arbitrator they have never met, to the mere use of online technology in order to facilitate traditional offline arbitration. Nonetheless, the use of online technology in arbitration is achieving increasing importance, so despite the vagueness inherent in the topic, it is important the distinctive characteristics of arbitration in an online environment be highlighted.

Whereas traditional arbitration involves the parties and the arbitrator(s) meeting at a particular location and time (synchronous), online arbitration may be asynchronous, in the

²²¹ Kaufman-Kohler & Schultz (2004).

²²² Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, OJ L 165, 18.6.2013 and Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, OJ L 165, 18.6.2013.

²²³ Kaufman-Kohler & Schultz (2004).

sense that all three actors need not participate in the steps of the arbitration (e.g. hearings, discovery) at the same time. One obvious benefit this creates is lower cost, as the parties and the arbitrator need not travel to a single location for proceedings, thereby saving both time and money. Additionally, however, the asynchronous nature of online arbitration means that parties can focus on their case during times of the day that would ordinarily be considered out-of-office hours. Alternatively, where an online arbitration involves a commercial party, online arbitration allows that party to maintain focus on regular business operations, only addressing the arbitral proceedings when it is convenient to do so. Similarly, where parties in a dispute come from substantially different timezones it is unnecessary to schedule the arbitration around this difficulty, as each party can simply undertake its required actions when it is convenient to do so.

The asynchronous nature of online arbitration, then, offers significant benefits, both in terms of avoiding disruption to business schedules and personal life, and by reducing the cost of the dispute resolution process.

In addition, merely through the introduction of information and communication technology (ICT), the effectiveness of any arbitral proceeding can be substantially improved. At the most basic level, for example, online access to ICT systems allows parties to file documents online, receiving instant confirmation of successful filing. ICT can also, however, be used in more substantial ways, such as through the creation of an online database of documents disclosed by both parties, searchable from any computer terminal, and sortable on the basis of relevance, theme, etc, allowing highlighting of relevant points, enabling the creation of links so that consultation of one document will result in the suggestion of a related document, and similar features.

At a more advanced level, ODR mechanisms such as automated negotiation and double-blind bidding can be adopted as a means of facilitating settlement of the parties' dispute prior to the commencement of traditional or online arbitral proceedings. In such a process the parties will often be required to insert up to three blind offers into the software, which will then proceed to settle the dispute either when the offers come within a pre-determined range or at a midpoint.²²⁴ However, while these procedures are currently primarily used in mediation and settlement, rather than arbitration, parties comfortable with the reliability of the software in question are able to bind themselves in advance to accept the result of the determination, allowing their dispute to be resolved by an automated process that does not require any human assessment.²²⁵

Ultimately, however, while such applications of ICT in an online environment can significantly benefit arbitration, substantially more significant opportunities are likely to appear as develops. Rather than just facilitating a variant of traditional arbitration, for example, the increasing sophistication of computer reasoning software raises the likelihood that ICT will, in limited cases, be able to act as a substitute for human arbitrators, rather than merely support for them. There is, of course, certainly no indication that computers will soon be able to analyse a complex dispute or evaluate the honesty of witnesses, however not all arbitrations are of this complex variety, and online arbitration procedures already exist in which disputing parties merely upload documents onto a website, have an arbitral procedure that may involve simply typing responses to questions from the arbitrator, and then receive a decision from an arbitrator they have never met.²²⁶ Such a

²²⁴ Katsch, E. (2004).

²²⁵ Importantly, under current arbitral laws it is very unlikely that the result of such an automated system would be enforceable as an arbitration award, as the process does not involve a decision being made on the basis of an interpretation of the law.

²²⁶ See, e.g. <https://www.equibbly.com/>

process ultimately relies upon precisely the form of decision-making computer software can be designed to mimic.

While high quality software of this type is not yet available, it is not unreasonable to expect that software capable of making legal evaluations at a competent level will be developed in the near future, at which point legislators will be faced with the need to address whether such a programme is engaged in the third-party interpretation and application of the law, just as is a human arbitrator.

Regulation of Online Arbitration

There is no European Union or transnational instrument regulating online arbitration as distinct from offline arbitration. This is true even in respect of the ODR Regulation.²²⁷ Consequently, online arbitration is regulated in the same manner as traditional offline arbitration. There are, however, features of online arbitration that suggest it should receive distinct regulator attention.

Regulation of traditional arbitration, for example, centers closely on the notion of the *lex arbitri*, the arbitration law of the seat of the arbitration. In traditional arbitration, that is, if the arbitration has been “seated” in a particular State, then national laws and transnational agreements treat the arbitration as taking place in that State no matter where physical proceedings are held. By way of example, if two Italian parties agree to seat their arbitration in Poland, but then hold all their hearings in Rome, the arbitration remains governed nonetheless by Polish law, unless the parties explicitly agree to change the seat to Italy. As a result, if their arbitration is performed in a way that violates Polish arbitration law, it can be set aside by Polish courts, even though neither the parties nor the arbitrators ever set foot in Poland. On the other hand, Italian courts would have no jurisdiction to set aside the award, as Italy was not the seat, even if all the proceedings occurred in Italy, the parties were Italian, and the dispute also concerned matters occurring solely in Italy.

If arbitration is conducted entirely online, however, questions arise regarding the seat of the arbitration. If the parties have agreed on the seat, then no particular difficulties arise. However, in the case of a traditional arbitration, if no agreement has been reached on the seat of the arbitration, then a court asked to hear an action related to the arbitration will usually determine the seat on the basis of where the arbitral proceedings were held. Where an arbitration is conducted entirely online, however, including any hearings, there is no longer any clear reference point by which to establish the seat of the arbitration, and thereby the legal rules that apply to the arbitration.

A further problematic feature of online arbitration relates to access to justice and to the parties’ due process rights. In traditional arbitration the procedures used in the arbitration must afford the parties the same right to be heard as does litigation before State courts. This does not mean that the procedures must be identical to those of a court, but that whatever procedures are adopted cannot undermine the fairness of the proceedings. Given that a particular attraction of online arbitration is the opportunity that it provides to save time and cut costs, online arbitration provides a particular incentive for less honest ADR institutions and arbitrators to offer procedures that do not fulfill due process guarantees. Although such an outcome would generally lead to the award’s nullity, especially in consumer arbitration cases involving significant negotiating disparity between the parties, the low cost of online arbitration heightens the likelihood that parties will engage in the arbitration without lawyers. Because of this, they may never realize that the process they

²²⁷ Regulation 524/2013 of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC, OJ L 165

have undertaken does not meet legal guarantees, and will simply pay the award, rather than challenge it in court.

Online arbitration, then, even if understood as merely another form of arbitration, creates particular risks that should be attended to by legislators, and that may not be adequately addressed by arbitration laws designed to apply to traditional offline arbitration.

Online Arbitration of Consumer Disputes

The potential low cost of online arbitration makes it particularly appealing in the consumer context, as many consumer disputes involve small sums of money that make a traditional offline arbitration impractical.²²⁸ Indeed, in the context of e-commerce online arbitration is particularly helpful, since it allows consumers to avoid court proceedings and language differences, the use of a foreign language and the technicalities of civil justice often being considered major obstacles to access to justice in the field of consumer contracts.²²⁹

While the European Union has not specifically addressed online arbitration, in November 2011, after an EU-wide consultation, the European Commission put forth a proposal based on Article 114 TFEU (former Article 95 TEC), addressing consumer ODR and other shortcomings in the consumer redress systems of the Member States. The proposal focused on gaps in the coverage of ADR mechanisms, insufficient awareness about these tools in the field of consumer contracts and variation in type and quality of such schemes.²³⁰ Following political agreement on the legislative proposal, Regulation 524/2013²³¹ (the ODR Regulation) was passed and published on 8 June 2013 alongside Directive 2013/11/EU on ADR.²³²

The ODR Regulation aims at providing an online dispute resolution platform for consumers and businesses trading electronically. Article 2 states that the Regulation applies to the out-of-court resolution of disputes concerning online contractual obligations between a consumer resident in the EU and a trader established in the EU, through the intervention of an ADR entity listed in accordance with Article 20(2) of Directive 2013/11/EU and operating on the aforementioned ODR platform.

The ODR platform is designed to be a single point of entry for consumers and traders: it is an interactive website, which can be accessed electronically and free of charge in all the official languages of the Union. The party commencing the procedure can fill in an online complaint form, which will then be submitted to the certified ADR entity entrusted with the task of resolving the dispute.²³³

Where the parties fail to agree within 30 calendar days on the appointment of an ADR entity,²³⁴ or the ADR entity refuses to deal with the dispute, the complaint will not be processed further and the complaining party will be informed of the possibility of contacting an ODR advisor for general information on other means of redress.²³⁵

When an out-of-court resolution of disputes is initiated by a trader against a consumer, the ODR Regulation only applies if the legislation of the Member State where the consumer is

²²⁸ Cortés, P. (2010).

²²⁹ European Commission (2009).

²³⁰ European Commission, Communication by the European Commission on Alternative Dispute Resolution for consumer disputes in the Single Market, COM (2011) 791 final.

²³¹ Regulation 524/2013 of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC, OJ L 165

²³² Directive 2013/11/EU of 21 May 2013 on Consumer Alternative Dispute Resolution, L 165/63.

²³³ See Articles 5-10 of the ODR Regulation, which set the regulation of the processing and transmission of the complaint form in greater detail.

²³⁴ The requirement that consumers and businesses have to agree on an ADR body raises concerns, especially because consumers lack expertise and could in some instances be unable to select an appropriate institution.

²³⁵ Article 9(8) of the ODR Regulation.

habitually resident allows for such disputes to be resolved through the intervention of an ADR entity.²³⁶ The United Kingdom and other Member States have already expressed their intention to exclude the possibility of traders submitting complaints against consumers.²³⁷

The competent authority of each Member State is to assess whether the ADR entities established in that Member State comply with the obligations set out in the ODR Regulation and in the ADR directive.²³⁸

Member States are to implement the ADR Directive by July 2015 and the ODR Regulation (making the EU ODR platform operational) in January 2016.²³⁹

Commentators have generally welcomed the new ADR and ODR rules as positive initiatives to strengthen consumers' out-of-court schemes, access to justice and effective redress.²⁴⁰ Some, however, have criticised them for not fulfilling the potential of an extra-judicial consumer redress system, as the contemplated ODR platform will mainly act as a referral website, thus not really allowing the prevention of conflicts.²⁴¹

Conclusion

Online arbitration is not currently subject to a legal regime that is distinct, wholly or partially, from traditional arbitration. In fact, commentators generally agree that online arbitration and traditional arbitration overwhelmingly share the same basic features,²⁴² and even the ODR Regulation, which concerns the resolution of disputes arising from the online purchase of products and services, does not restrict the use of traditional arbitration. Rather, the Regulation envisages an ODR platform, which is meant to filter complaints and forward cases to appropriate ADR institutions.²⁴³

It is far from clear, however, that treating online arbitration as either just a form of traditional offline arbitration, or as a binding form of ODR, sufficiently addresses the particular characteristics that can make online arbitration both enormously beneficial and potentially problematic. Legislators have thus far largely been able to ignore online arbitration, as the technology that makes it possible is only in its infancy. That technology, however, is rapidly improving, and unless legislators take seriously the features that make online arbitration unique, significant problems can be expected to occur.

Focus

(i) Binding versus non-binding online arbitration and the enforcement of awards

Arbitration, at least in principle, is the only binding dispute resolution method available in cyberspace.²⁴⁴ In fact, two forms of arbitration should be distinguished in the context of online transactions.

First, there exists a traditional, binding online arbitration that is regulated by a relevant arbitration law (or laws) and whose outcome (that is, an arbitral award) is enforced pursuant to the provisions of the New York Convention on the Recognition and Enforcement

²³⁶ Article 2(1) of the ODR Regulation.

²³⁷ < <https://www.gov.uk/government/consultations/alternative-dispute-resolution-for-consumers> >, accessed 16 September 2014.

²³⁸ Article 15 of the ODR Regulation and Article 20 of the ADR Directive.

²³⁹ European Commission at http://ec.europa.eu/consumers/redress_cons/adr_policy_work_en.htm

²⁴⁰ Hornle, J. (2012); Benohr, I. (2013); Reich, N. (2014).

²⁴¹ Cortés, P. (2014).

²⁴² Katsh, E. and Rifkin, J. (2001); Morek, R. (2006).

²⁴³ It should also be noted that an UNCITRAL working group is in the process of drafting model rules for settling low-value B2B and B2C disputes arising from cross-border e-commerce contracts. This procedure will involve three online stages, namely negotiation, facilitation and arbitration/adjudication.

See http://www.uncitral.org/uncitral/commission/working_groups/3Online_Dispute_Resolution.html.

²⁴⁴ Kaufmann-Kohler, 2005.

of Foreign Arbitral Awards of 1958. One recent international treaty, the United Nations Convention on the Use of Electronic Communications in International Contracts of 23 November 2005 (ECC), facilitates the enforcement of arbitral awards rendered as a result of binding online arbitration processes. The ECC applies to cross-border electronic communications in business-to-business (B2B) contracts, where at least one party has its place of business in a Contracting State (Article 1 of the ECC). The ECC is based on the principle of functional equivalence and it recognises electronic communications as an equivalent of paper-based communications, as well as electronic authentication methods as an equivalent of handwritten signatures (Article 9 of the ECC). As such, the ECC eliminates the formal obstacles to a wide use of electronic communications in arbitration, as enshrined in the New York Convention of 1958. In this view, arbitral awards issued in the course of a binding online arbitration can be enforced in courts either in the form of printed online awards that are hand-signed by the arbitrators and notified to the parties, or in the form of electronic documents signed and notified to the parties electronically.

Second, online environment features the non-binding and unilaterally binding online arbitration. Non-binding online arbitration is applied when the parties do not intend to be legally bound by either the arbitration agreement or the arbitration award.²⁴⁵ Unilaterally binding online arbitration, in turn, involves the scenarios in which only one party to arbitration proceedings is legally bound with either the arbitration agreement or the outcome of the proceedings. Generally, non-binding online arbitration is self-enforced pursuant to the provisions of relevant contract law or in accordance with unofficial enforcement techniques including reputational dynamics, financial instruments or technical control.²⁴⁶ These types of online arbitration involve various informal schemes (as opposed to traditional, binding arbitration), such as the adjudication system for domain names and trademarks (e.g. the Uniform Domain-Name Dispute-Resolution Policy offered by the Internet Corporation for the Assigned Names and Numbers) or ombudsman services to resolve consumer disputes.²⁴⁷ The non-binding and unilaterally binding forms of online arbitration are not considered as “true” arbitration processes. This is partially so because the decisions issued in the course of non-binding or unilaterally binding arbitration proceedings are subject to *de novo* review by the courts upon a relevant application made by a party. In practice, however, the parties rarely challenge these somewhat informal decisions in courts.²⁴⁸

(ii) Authentication: e-communications and e-evidence

Online arbitration necessitates questions regarding the authentication of documents exchanged and produced in the course of online arbitration proceedings. How can the actors participating in online arbitration processes (including arbitrators and service providers such as arbitral institutions) ensure that documents are duly transmitted and served to the parties, and that the parties identify themselves adequately when sending the documentation during online proceedings? Today’s technology is increasingly able to deal with these issues. Moreover, today’s online arbitration is entirely handled by arbitral institutions and online service providers that developed a number of platforms equipped with secure communications systems. For example, the International Chamber of Commerce (ICC) launched in 2005 an online platform called “ICC NetCase” that enabled the parties and arbitrators to communicate by means of a secure website hosted and maintained by the ICC. Since ICC NetCase was not entirely a successful initiative, it is

²⁴⁵ Kaufmann-Kohler (2005).

²⁴⁶ Kaufmann-Kohler (2005).

²⁴⁷ Cortes (2014).

²⁴⁸ Cortes (2014).

relevant to mention here other platforms developed globally, such as Modria that was selected by the American Arbitration Association to handle its New York No Fault cases.²⁴⁹ Yet, a more challenging issue concerns e-disclosure and the exchange and production of documents in online arbitration proceedings. These issues are challenging because evidence can be more easily tampered with. Again, some arbitral institutions issued guidelines and protocols that exclusively govern e-disclosure. In 2008, the Chartered Institute of Arbitrators (CIArb) adopted its 'Protocol for E-Disclosure in Arbitration' (CIArb Protocol). The CIArb Protocol contains provisions enhancing the early consideration of e-disclosure, in particular in situations in which such early consideration may contribute to cost-effectiveness and expeditiousness of arbitration proceedings. Additionally, the CIArb Protocol addresses the procedural issues related to e-disclosure such as the form of the requests for e-disclosure and the format in which the production of electronic documents should be made. Also the ICC Commission, in 2011, issued its own Report on the 'Production of Electronic Documents in International Arbitration'. The ICC Report confirms that e-disclosure and the production of e-documents should respect the principles of materiality, specificity, proportionality and relevance with a view on the time and costs of arbitration proceedings.

(iii) Online consumer arbitration

The ECC does not apply to consumer contracts (Article 2(1)(a) of the ECC). Therefore, it is still questionable whether electronically concluded arbitration agreements involving consumers are valid under the NY Convention of 1958, which leads to legal uncertainty. National and regional laws have dealt with this issue in varied manners, in particular by means of restricting the use of pre-dispute arbitration agreements in consumer contracts. This is a function of the inconsistent national implementations of the Directive on Unfair Terms in Consumer Contracts, which connects the validity of pre-dispute arbitration agreements in consumer contracts with national arbitration schemes.²⁵⁰ For example, Article 2061 of the French Civil Code does not allow arbitration in domestic consumer contracts. The provisions of Article 2061, however, do not apply to international arbitration. In fact, the French Court of Cassation at least on two occasions confirmed that pre-dispute arbitration clauses were valid with regard to consumers in the international context.²⁵¹ In turn, Articles 89-91 of the UK Arbitration Act of 1996 limit the understanding of the unfair pre-dispute arbitration in consumer contracts to low value claims (with the amount at stake not exceeding £5,000).

Although mandatory pre-dispute arbitration clauses are often found invalid in most European jurisdictions, pre-dispute arbitration clauses are not *per se* invalid under EU law.²⁵² The validity of such clauses is determined on a case-by-case basis in view of their potential suitability and fairness for the resolution of disputes involving consumers.²⁵³ Also, the online component *alone* should not affect the validity of a pre-dispute consumer arbitration clause. Interesting observations can be drawn from the judgment of the Court of Justice of the European Union (CJEU) in *Alassini and others v Telecom Italia SpA*.²⁵⁴ The CJEU was faced with a question of whether Italian law, that required the parties to rely on mandatory out-of-court dispute resolution procedure (online conciliation before Co.re.com)

²⁴⁹ For a detailed description of Modria see: <http://www.modria.com/newsroom/american-arbitration-association-selects-modria-power-new-york-fault-caseload/>.

²⁵⁰ Cortes (2011).

²⁵¹ Kaufmann-Kohler (2005); Cass. civ. 1re, 21 May 1997, Meglio v. V2000, Rev. cri. dr. internat. privé 1998.87 (Annot. V. Heuzé) ; Cass. civ. 1re, 21 May 1997, Renault v. V2000, Rev. arb. 1997, 1997.537 (Annot. E. Gaillard).

²⁵² Cortes (2014).

²⁵³ Cortes (2011).

²⁵⁴ *Alassini and others v Telecom Italia SpA*, Joined Cases C-317/08 to C-320/08 [2010] ECR I-2213.

prior to initiating court proceedings, would affect the exercise of rights conferred on individuals under the Universal Service Directive. The CJEU did not find that the mandatory settlement procedure at hand affected individual rights of the parties who were subject to such procedure. First, the CJEU held that the outcome of the online conciliation was not binding upon the parties and therefore it did not prejudice the parties' right to bring legal proceedings. Second, the CJEU stated that the use of mandatory conciliation did not contribute to a significant delay for initiating court proceedings by the parties. Third, the CJEU noted that—since the procedure before Co.re.com was free of charge—the parties were not exposed to any significant costs that such procedure could entail. Finally, the CJEU held that the consumers could not be obliged to participate in online-proceedings if their access to technology was limited. In this view, the use of mandatory online out-of-court settlement procedures should not hinder the parties' right to access to justice should such procedures be accessible only by electronic means. This approach has been recently incorporated into Article 8(a) of Directive 2013/11/EU on Consumer ADR, which also applies to consumer arbitration. Additionally, Article 10 of the Directive 2013/11/EU on Consumer ADR requires that certified ADR schemes offer arbitration to consumers only after a dispute has arisen.

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3. PART C – ARBITRATION AND THE STATE IN THE EUROPEAN UNION

3.1. States and arbitration in the European Union

3.1.1. Introduction

This section analyses the participation of Member States/Switzerland and Member States entities (collectively “European State Bodies”²⁵⁵), as well as of the European Union itself, in arbitration, addressing both prior practice and current issues raised in the European Union context. The section consists of three main parts that address the following problems: (a) the existence of any formal restrictions on the ability of European State Bodies to consent to arbitration; (b) the contexts in which arbitration agreements involving European State Bodies are most commonly found; and (c) the practical implications of the involvement of European State Bodies in arbitrations. The latter subsection outlines the relationship between investor-State arbitrations (arising under intra-EU and extra-EU bilateral investment agreements (BITs) and other international investment agreements (IIAs)) and the EU legal order, as well as the position of arbitral tribunals vis-à-vis EU law, in particular with respect to the admissibility by the Court of Justice of the European Union (CJEU) of preliminary questions submitted by arbitral tribunals. This section shall also provide guidance with respect to the most likely forms of arbitration in which European State Bodies may be involved in the future, based on the arbitration agreements that have thus far been entered into by such bodies.

3.1.2. Formal restrictions on the ability of European State Bodies to consent to arbitration

The primary issue in this context is whether the jurisdiction of an arbitral tribunal in a dispute involving a European State Body should be determined in precisely the same way as would be done in an arbitration between two commercial parties, or if any possible restrictions on the power of a State to enter into an arbitration agreement should also be considered. Although the existence of such restrictions is now less common than it once was, public policy concerns allegedly raised by the participation of European State Bodies in arbitration mean that national laws can sometimes constrain the ability of European State Bodies to enter into arbitration agreements with private parties.

The submission of States to the jurisdiction of an arbitral tribunal raises clear issues of State sovereignty, particularly where the law of the State in question specifically regulates the ability of State Bodies to enter into arbitration agreements. However, some commentators have argued that questions regarding arbitration agreements entered into by States or State entities should be analysed solely through conventional conflict-of-law analysis, including reference to international public policy, rather than through deference to the domestic law of the State in question.²⁵⁶

Although there is a general trend towards the liberalization of the participation of States and State Bodies in arbitration proceedings, which has increased progressively but is

²⁵⁵ The term “European State Body” encompasses all bodies and entities forming the structure of Member States. Although the articulation of such bodies is governed by the applicable domestic law and can change from one Member State to the other, this Study adopts a broad interpretation of the notion of European State Bodies, so as to encompass every entity which forms part of the structure of a Member State.

²⁵⁶ Lew, Mistelis & Kröll (2003); Gaillard & Savage (1999).

particularly evident from the 1970s onwards, this was not always the case. By way of example, disputes arising out of investment contracts relating to infrastructure and natural resources were often not permitted to be arbitrated, on the rationale that such disputes did not constitute “true” commercial disputes, and that only the latter should be submitted to arbitration.²⁵⁷

Within the European Union itself, prior to 1998 Belgian law placed limits on the ability of Belgian public law entities to enter into arbitration agreements.²⁵⁸ However, under Article 1676.2 of the Law of 19 May 1998 Amending the Belgian Legislation Relating to Arbitration, public law entities in Belgium were permitted to conclude arbitration agreements in the two following situations. First, if the arbitration agreement concerned the settlement of disputes regarding the formation or the performance of the underlying agreement, the validity of the arbitration agreement was subject to the same conditions that had to be met by the underlying agreement.²⁵⁹ Second, when public authorities were authorised to conclude arbitration agreements “in respect of any matters” determined by law or by a Royal Decree adopted by the Council of Ministers, the legal instruments granting this power could also establish the requirements for arbitration agreements entered into by those public authorities (Article 1676.2 of the Law of 19 May 1998 Amending the Belgian Legislation Relating to Arbitration). With the adoption of the new Belgian arbitration law in 2013, however, all restrictions on the ability of Belgian public law entities to enter into arbitration agreements have been abolished (the new Belgian Law on Arbitration of 24 June 2013, bill no. 53-2743).

Article 2060 of the French Civil Code generally excludes the participation of public entities in domestic arbitration, unless such entities are specifically authorized to enter into arbitration agreements by means of a legal decree. This restriction gave rise to confusion regarding the possibility of the French State or State entities participating in international arbitrations. While the French Supreme Court has been long held that this restriction did not apply to international arbitration (e.g. the judgment of the *Cour de cassation, Trésor Public v Galakis, first civil chamber*, Case No. 61-12.255 (2 May 1966)), it was only positively settled in 1986 when the French legislator expressly stated that French State and State entities were allowed to enter into arbitration agreements in international contracts, insofar as such contracts related to an “operation of national interest” (Article 9, Law No 86-972 of 19 August 1986).

Despite the historical existence of such restrictions, motivated by public policy concerns regarding the removal of disputes involving State entities from the national court system, there is a clear contemporary trend to eliminate restrictions in national law on the capacity of States or State entities to enter into arbitration agreements.²⁶⁰ In addition, arbitral tribunals have often rejected a State Body’s attempt to invoke its formal inability to enter into an arbitration agreement, when brought to arbitration by a private party.

Both of these trends are motivated by the recognition that where a private party has in good faith entered into an arbitration agreement with a State entity, unaware of the existence of a formal restriction in national law on that entity’s ability to enter into arbitration agreements, an injustice is done to the private party if the arbitral tribunal declines jurisdiction. That party has, after all, not received the dispute resolution procedure for which it had bargained.

Indeed, this view is particularly persuasive because the situation as just described does not involve two equally informed parties. Rather, the State entity was in a privileged position to

²⁵⁷ Lew, Mistelis & Kröll (2003).

²⁵⁸ Redfern, Hunter, Blackaby & Partasides (2009).

²⁵⁹ Canivet, M., Goffin JF. (2012) at 112.

²⁶⁰ Lew, Mistelis & Kröll (2003).

know the limitations on its ability to enter into arbitration agreements, and acted either negligently or in bad faith when it did so.

A blunt application of this doctrine, however, rejecting a State Body's invocation of its formal inability to arbitrate disputes whenever it has indeed entered into an arbitration agreement, would ignore the important public policy considerations that motivated the adoption of the restriction in national law on the ability of State Bodies to enter into arbitration agreements. As a result, this argument should only be available where the private party acts in good faith, meaning it genuinely has "clean hands". However, where the private party knew, or should reasonably have known, of the restriction on the State Body's ability to enter into arbitration agreements, the equity concerns raised above do not apply, and an arbitral tribunal should apply the national law restrictions as they are written.²⁶¹

There is disagreement within the arbitral community as to whether a tribunal serving in an arbitration in which the law of the seat of the arbitration is the same law as that which restricts the ability of the State Body to enter into arbitration agreements, should apply that law despite the equity concerns raised above. Proponents of a "delocalized" view of arbitration in particular would regard a tribunal as not bound by the law of the seat in such a situation. The better view, however, is that in such a situation the tribunal is functioning under the arbitration laws of the seat, and cannot legitimately use equity concerns to ignore that law. This would only be appropriate where the law of the seat was not the law restricting the ability of the State Body from entering into arbitration agreements.

As already noted, however, restrictions of this type are becoming far less common. Indeed, as early as 1961, Article II of the European Convention on International Commercial Arbitration of 1961 (Convention of 1961) confirmed the right of "legal persons of public law" to conclude valid arbitration agreements. If a State wished to restrict or prohibit the ability of its public bodies to enter into arbitration agreements it was required to make a relevant reservation upon signing, ratifying or acceding to the Convention (Article II of the Convention of 1961).

Additionally, not only have European States begun to remove restrictions in national law on the ability of State Bodies to enter into arbitration agreements, as discussed above, but one national law, the law of Switzerland, now includes a provisions expressly prohibiting State authorities from invoking national law provisions when claiming the disability of such authorities to be bound by an arbitration agreement. Article 177 of the Swiss Private International Law Act of 1987 reads as follows:²⁶²

2. If one party to an arbitration agreement is a State or an enterprise dominated by or an organization controlled by a State, it may not invoke its own law to contest the arbitrability of a dispute or its capacity to be subject to an arbitration.

Article 177 was drafted in order to increase legal certainty and the predictability of transactions involving States or State Bodies. Its aim was also to facilitate the fulfilment by State entities of their obligations as set forth in arbitration agreements into which they had entered.

In light of this clear trend away from restrictions on the ability of State Bodies to enter into arbitration agreements, it is striking that the Lithuanian Law on Commercial Arbitration of 21 June 2012 (2012 Law) retained the restrictions on the ability of a State or State-owned

²⁶¹ See, e.g. *Técnicas Medioambientales TECMED SA v United Mexican States*, Award, 29 May 2003, 10 ICSID Reports 134 (arbitration agreements involving States should be interpreted in the context of good faith and the reasonable and legitimate expectations of the parties when entering into such agreements).

²⁶² Federal Law of December 18, 1987 on International Private Law (amended on July 1st, 2013)

enterprise or organization to conclude arbitration agreements that were originally included in the Lithuanian Law on Commercial Arbitration of 1996. Pursuant to paragraphs 3 and 4 of Article 12 of the 2012 Law, disputes to which a State or municipal enterprise or an institution or organisation (save from the Bank of Lithuania) is a party may not be referred to arbitration unless prior consent of the founder of such entities has been obtained. The Government of the Republic of Lithuania, however, and any authorised state institutions, may enter into commercial contracts containing an arbitration clause.

Lithuanian experience with the restrictions enshrined in Article 12 of the 2012 Law illustrate well the difficulties that such restrictions can cause, as they have reportedly resulted in the arguable misinterpretation of a number of arbitration agreements concluded prior to the enactment of the 2012 Law. Lithuanian parties, that is, believing that the State entity with which they have an arbitration agreement did not receive a required authorization to enter into that agreement, have submitted their claims to Lithuanian courts, instead of to arbitration tribunals.²⁶³ Importantly, however, there are no clear requirements as to the form that the required authorization must take, as pursuant to the judgment of the Supreme Court of the Republic Lithuania of 5 March 2007, such a consent might be given verbally, in writing or by conduct.²⁶⁴ This makes interpretation of Article 12 of the 2012 Law potentially complex, as it means that a broad range of evidentiary arguments can be presented to any tribunal examining whether a binding arbitration exists. As a result, private parties that believe they have a properly authorized arbitration agreement with a State Body may nonetheless have their agreement declared invalid by a tribunal because the consent that was given by the authorizing party is found to be inadequate, while State Bodies may find themselves bound by arbitration agreements that were not properly authorized because a tribunal interpreted a vague or ambiguous statement by an official as constituting the required authorization. Unsurprisingly, this aspect of the 2012 law has been highly criticized by the Lithuanian arbitration community and beyond, due to its potential negative impact on arbitration proceedings.²⁶⁵

3.1.3. Arbitrations involving European State Bodies

This subsection provides an overview of the different forms and number of arbitration proceedings in which European State Bodies and the European Union itself have been involved since 1999. The analysis provided in this subsection is based on the data included in the Appendix to section C of this Study.

Investment arbitrations

Most arbitration proceedings involving EU Member States and Switzerland arise out of or in connection with BITs and other IIAs, under specific provisions on Investor-State Dispute Settlement (ISDS) (hereinafter also “investor-State arbitration”) contained therein. An ISDS mechanism allows an investor from a foreign country (“Home State”) to bring a claim against a State in which the investor has made an investment (“Host State”).²⁶⁶ Most ISDS procedures arise out of agreements to arbitrate included in Bilateral Investment Treaties (BITs) and plurilateral agreements such as the Energy Charter Treaty (ECT). Moreover, in the EU context, BITs include both BITs concluded by Member States with non-EU States

²⁶³ D Foigt – Norvaišienė (2014).

²⁶⁴ Civil case No. 3K-3-62/2007 as cited in: Ibid.

²⁶⁵ Ibid.

²⁶⁶ Investor-State Dispute Settlement (ISDS): State of Play and Prospects for Reform, EPRS, Briefing, 21 January 2014.

(so-called “extra-EU BITs”) and BITs entered into by fellow Member States (known as “intra-EU BITs”).²⁶⁷

To date the EU itself is a party only to IIAs that do not contain investor-State arbitration provisions, with the sole exception of the Energy Charter Treaty. The 28 Member States, however, are currently signatories of 1,356 extra-EU BITs, of which 1,160 are in force, a number of which include investor-State arbitration provisions.²⁶⁸

The activity of Member States regarding the conclusion of BITs varies from one Member State to another, with Germany currently being a party to 129 BITs and Ireland being a party to none.²⁶⁹ The number of active intra-EU BITs of Member States amounts to 199, of which 198 are in force.²⁷⁰ While many IIAs involving Member States involve States unlikely to be a source of significant investment in the EU (but likely to be destinations of investment by EU-based companies), nine Member States (Bulgaria, Croatia, the Czech Republic, Estonia, Latvia, Lithuania, Poland, Romania, and Slovakia) have concluded BITs with the United States, a major source of investment in the European Union.²⁷¹ Given the inclusion of investor-State arbitration within many IIAs signed by Member States, it is necessary to understand the primary fora in which such arbitrations would occur.

(i) ICSID

The ISDS provisions in many BITs allow an investor to select from two or more methods of dispute resolution, however by far the most common forum for the arbitration of investor-State disputes is the International Centre for Settlement of Investment Disputes (ICSID), an institution of the World Bank group.²⁷² ICSID was founded with the Convention on the Settlement of Investment Disputes between States and Nationals of other States, which was open for signature on March 18, 1965 and entered into effect as of October 14, 1966 (ICSID Convention). All EU Member States other than Poland are parties to the ICSID Convention.

The ICSID arbitration regime is applicable to legal disputes between investors who are nationals of an ICSID Contracting State and Contracting States in which they have invested. The structure of ICSID arbitration derives from the provisions of the ICSID Convention and the rules adopted in accordance with it. In addition to the ICSID Rules of Procedure for Arbitration Proceedings (ICSID Arbitration Rules), ICSID also offers the Additional Facility Rules, which can be used for certain investor-State arbitrations that are not covered by the ICSID Convention. ICSID Arbitration is truly “delocalized,” meaning that they are subject only to the provisions of the ICSID Convention and Rules, and are independent of any national law. Arbitral awards arising from ICSID arbitrations are also directly enforceable in the territory of Contracting States, with the only mechanism for challenge being a limited review procedure made available within ICSID itself.

²⁶⁷ United Nations Conference on Trade and Development (UNCTAD), *Investor-State Dispute Settlement: An Information Note on the United States and the European Union*, IIA Issues Note, No. 2, June 2014, available at UNCTAD website at: www.unctad.org/diae; List of the bilateral investment agreements referred to in Article 4(1) of Regulation (EU) No 1219/2012 of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries (2013/C 131/02)

²⁶⁸ *Ibid.*

²⁶⁹ *Ibid.*

²⁷⁰ *Ibid.* These numbers do not include active relationships of Member States under the Energy Charter Treaty and its ISDS mechanism.

²⁷¹ *Ibid.*

²⁷² Although the existence of investment arbitrations conducted under the auspices of other arbitral institutions is not necessarily made public, and it is therefore not possible to provide official statistical data in this regard there is in practice no doubt that ICSID plays the leading role in the administration of investment disputes. For a general overview on the history of ICSID and its rise as the leading institution in the field see Parra (2012).

While ICSID began publishing statistics on its caseload in 2010, it was only in 2014 that it published statistics focusing solely on arbitrations involving EU Member States.²⁷³ Available information, however, show certain trends regarding the historical appearance of Member States and Switzerland before ICSID arbitral tribunals.

In the first 20 years of ICSID's existence, the caseload of ICSID was modest, with the number of ICSID arbitrations only increasingly substantially in the 1990s due to the proliferation of BITs and other IIAs containing ICSID arbitration provisions. Up to 1999 the overall caseload of ICSID (including also non-EU States) did not exceed 10 new cases per year.²⁷⁴ Member States who participated in ICSID arbitrations in this pre-1999 time period included Spain (*Emilio Agustín Maffezini v. Kingdom of Spain* (ICSID Case No. ARB/97/7)), Hungary (*AES Summit Generation Limited v. Republic of Hungary* (ICSID Case No. ARB/01/4)), Estonia (*Alex Genin and others v. Republic of Estonia* (ICSID Case No. ARB/99/2)), and Slovakia (*Československa obchodní banka, a.s. v. Slovak Republic* (ICSID Case No. ARB/97/4)).

By 2003 this situation had changed significantly, with ICSID registering over 40 new cases.²⁷⁵ Indeed, in the period between 2012 and 2014, ICSID has registered over 50 new arbitration cases annually, with 57 new known investor-state arbitrations submitted in 2013.²⁷⁶

The range of EU Member States currently involved in ICSID arbitrations is broad, and includes both "new" and "old" Member States. Some Member States have been particularly active in ICSID arbitration proceedings, with Hungary (11 ICSID arbitrations) and Romania (9 ICSID arbitrations) being most active. Other European States, however, have not been involved in any known ICSID arbitration yet. This is the case of Austria, Denmark, Finland, Ireland, Luxembourg, Malta, Netherlands, Portugal, Sweden, the United Kingdom, and also Switzerland.²⁷⁷

The most common sources of disputes addressed in ICSID arbitrations involving EU Member States/Switzerland fell within the following economic sectors: Electric Power and Other Energy (24%), Finance (13%), Oil, Gas and Mining (7%), Information and Communication (7%), Transportation (7%), and Other Industry (24%).²⁷⁸

One particularly important trend is reflected in the fact that in 2013-14 there has been a particularly large number of cases brought against the Czech Republic and Spain.²⁷⁹ These cases have been focused particularly in the field of energy, arising out of the new energy regulations adopted in the Czech Republic and the new governmental procedures adopted

²⁷³ The ICSID Caseload Statistics (Special Focus – European Union) concerning the cases registered with ICSID as of March 1, 2014 available on the ICSID website at:

<https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDNewsLettersRH&actionVal=ShowDocument&DocId=DCEVENTS31>.

²⁷⁴ United Nations Conference on Trade and Development (UNCTAD), Investor-State Dispute Settlement: An Information Note on the United States and the European Union, IIA Issues Note, No. 2, June 2014, available at UNCTAD website at: www.unctad.org/diae.

²⁷⁵ United Nations Conference on Trade and Development (UNCTAD), Investor-State Dispute Settlement: An Information Note on the United States and the European Union, IIA Issues Note, No. 2, June 2014, available at UNCTAD website at: www.unctad.org/diae.

²⁷⁶ Ibid.

²⁷⁷ The ICSID Caseload Statistics (Special Focus – European Union) concerning the cases registered with ICSID as of March 1, 2014 available on the ICSID website at:

<https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDNewsLettersRH&actionVal=ShowDocument&DocId=DCEVENTS31>.

²⁷⁸ The ICSID Caseload Statistics (Special Focus – European Union), chart 5, p. 10.

²⁷⁹ Recent Developments in Investor-State Dispute Settlement (ISDS), UNCTAD IIA Issue Note No. 1, April 2014, available at UNCTAD website at: www.unctad.org/diae.

in Spain regarding solar energy producers.²⁸⁰ It is believed that due to the ongoing withdrawal in Spain of governmental support for nuclear energy investments, Spain will face further investor-State arbitrations in the field of energy in the future.

Similar issues are also being addressed in two ICSID arbitration proceedings filed by the Swedish atomic energy group Vattenfall against Germany in 2009 and 2012, respectively *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG & Co. KG (Sweden) v. Federal Republic of Germany* (ICSID Case No. ARB/09/6) and *Vattenfall AB (Sweden) et al v. Germany* (ICSID Case No. ARB/12/12)). The compensation claims submitted by Vattenfall in the first arbitration arose out of the decision of the Hamburg Environmental Authority to impose additional water quality standards on Vattenfall with respect to the construction of a coal-fired power plant in Hamburg. The second arbitration focuses on the decision of the German Federal Government to phase-out nuclear power plants (including plants operated by Vattenfall) in view of changes to the Nuclear Power Act adopted in 2011.

The increasing number of ICSID arbitrations arising out of alleged violations by Member State governments of obligations towards foreign investors in the energy field, combined with ongoing efforts by Member State governments to ensure the alignment of their energy policies with environmental considerations, suggests that further cases of this type will be brought in the future.

Ad hoc Arbitrations

Although it may not be immediately apparent from examining the cases included in the Annex, the most frequent alternative to ICSID arbitration for investor-State disputes is *ad hoc* arbitration proceedings, in which the parties organise their own proceeding, without submitting it to any institution. The parties thereby gain greater flexibility, as they do not need to adhere to institutional rules, and can also ensure greater levels of confidentiality, as no-one external to the dispute need be involved. Importantly, however, they also lose the benefits of institutional arbitration, including the administrative expertise of the institution, access to the institution's arbitration rules, and the scrutiny of awards provided by many institutions as a way of ensuring the quality of awards delivered by the tribunal.

In practice, most *ad hoc* investor-State arbitrations are conducted under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) of 1976 as revised in 2010, with new Article 1, paragraph 4, as adopted in 2013 (UNCITRAL Arbitration Rules). The UNCITRAL Arbitration Rules were expressly designed for use in *ad hoc* arbitration, as a means of providing parties to *ad hoc* arbitration with a professional and effective set of rules for an international arbitration, thereby removing the necessity for the parties to create their own rules. Available statistics indicate that UNCITRAL investor-State arbitrations constitute about 20-30% of all known investor-State proceedings.²⁸¹

One likely appeal of the UNCITRAL Arbitration Rules in the field of investor-State arbitration is that by providing parties with an effective method for arbitrating without involving an arbitration institution, they enhance the ability of the parties to the dispute to maintain confidentiality. Indeed, there is no record of investor-State arbitrations that have occurred under the UNCITRAL Arbitration Rules, meaning that it is at least technically possible for an arbitration to occur without being publicly known at all – although the small size of the

²⁸⁰ Ibid. Most recently, the Czech Republic has been a party to the following UNCITRAL arbitrations regarding solar energy disputes: *Antaris and other v. Czech Republic*; *Natland Investment Group and others v. Czech Republic*; *I.C.W. Europe Investments Ltd v. Czech Republic*; *Voltaic Network GmbH v. Czech Republic*; *Photovoltaik Knopf Betriebs-GmbH v. Czech Republic*; *WA Investments-Europa Nova Limited v. Czech Republic*.

²⁸¹ See: Horn, N. (2008) at 587-602; *Recent Developments in Investor-State Dispute Settlement (ISDS)*, UNCTAD IIA Issue Note No. 1, April 2014, available at UNCTAD website at: www.unctad.org/diae.

investment arbitration community means that information will often become public even against the wishes of the parties.²⁸²

Within the European Union, according to the data in the Annex to this study, the Czech Republic has participated in the largest number of publicly-known investor-State arbitrations, followed by Poland and Slovakia. Other Member States such as Germany, Spain, Croatia, and Bulgaria have also participated in investor-State arbitrations under the UNCITRAL Arbitration Rules, but more sporadically. As already mentioned, however, it is always important to remember that the number of undisclosed UNCITRAL arbitration cases is unknown, so statements of this type must always be viewed cautiously.

In terms of process, investor-State arbitrations under the UNCITRAL Arbitration Rules are distinct from ICSID arbitration proceedings in many aspects. In terms of enforcement, for example, while the ICSID Convention provides for the direct enforcement of ICSID arbitral awards, awards under the UNCITRAL Arbitration Rules must rely on traditional enforcement mechanisms, such as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. As a result, UNCITRAL awards can be challenged on the same grounds as commercial arbitration awards, and remains subject to the views on arbitration of domestic courts.

Most importantly, however, while the ICSID arbitration rules were expressly designed for investor-State arbitration, the UNCITRAL Arbitration Rules were designed almost 40 years ago for commercial arbitration proceedings. As a result, some questions have been raised regarding their suitability for use in investor-State disputes.

Such questions often focus on the fact that investor-State arbitrations can involve matters of legitimate public interest that generate calls for public oversight and accountability. Commercial arbitrations, on the other hand, involve a private dispute between two business parties, which usually raises no significant public concerns. Because of this difference, it is argued, different procedural rules should be applied in each context, and commercial arbitration rules such as the UNCITRAL Arbitration Rules are ill-suited for use in investor-State arbitration.²⁸³

UNCITRAL has, however, actively attempted to respond to such concerns, and indeed on one topic, transparency of proceedings, is currently leading the field. This can be seen in the adoption of the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration (Transparency Rules), which came into force on April 1, 2014. These Rules provided for a number of changes aimed at making investor-State arbitration proceedings under the UNCITRAL Arbitration Rules more transparent to the general public. They provide, for example, in certain circumstances, for public access to documents produced by the parties during the proceedings, as well as for public participation in hearings. Moreover, the Rules provided a limited possibility for third parties to make submissions to the tribunal. Future practice in investor-State arbitrations under the UNCITRAL Arbitration Rules will show whether these rules significantly alter tribunal practice, and thereby indeed increase the transparency of investor-State arbitrations under the UNCITRAL Arbitration Rules, but the mere fact that the Transparency Rules have been adopted at all indicates both seriousness with which issues of transparency are being treated within the investment arbitration community, and the commitment of UNCITRAL to adapt its Arbitration Rules to suit the investment arbitration context.

²⁸² The most highly regarded source of such information is the Investment Arbitration Reporter: <http://www.iareporter.com/>

²⁸³ An analysis of the application of the UNCITRAL Rules in the context of investment arbitration is carried out by Horn (2008).

Administered Arbitrations

While ICSID is the most important institution for the administration of investor-State arbitration, it is nonetheless possible to use any arbitral institution, and a small number of other institutions have developed a presence in investor-State arbitration, usually in the form of providing limited institutional support, including the appointment of arbitrators, to arbitrations occurring under the UNCITRAL Arbitration Rules. The Permanent Court of Arbitration (PCA) in The Hague and the Arbitration Institute at the Stockholm Chamber of Commerce (SCC) have been most prominent in this regard.

The PCA has administered several investor-State arbitrations under the UNCITRAL Arbitration Rules involving Member States.²⁸⁴ Importantly, however, not all PCA arbitrations appear on the publicly-available docket, so further arbitrations also exist. Currently, for example, there are 39 further investor-state arbitrations registered with the PCA, information on which is not publicly available.²⁸⁵

Statistics provided by the SCC regarding the SCC's administration of investor-State arbitration under the UNCITRAL Arbitration Rules do not break down cases in terms of participation by EU Member States as opposed to non-EU parties. Nor do they specify the exact amount of investor-State arbitrations currently administered by the SCC.²⁸⁶ However, they do confirm that for 57 investor-State arbitrations since 1993, the SCC has either served as administering institution for arbitrations held under the SCC Arbitration Rules, or has served as appointing authority for arbitrations held under the UNCITRAL Arbitration Rules.²⁸⁷ The SCC has achieved this prominence in investor-State arbitration because it has traditionally been viewed as a neutral institution for the arbitration of disputes between western parties and governments in Eastern Europe and Russia. Indeed, for this reason the SCC is expressly referred to in the Energy Charter Treaty as an administering institution, a reference that serves as the basis of the substantial number of the SCC's pending and conclude investor-State arbitrations. As always, however, it should be emphasised that due to the restraints of confidentiality the exact number of investor-State arbitrations administered by the SCC is unknown.

Finally, while the SCC has achieved a particular prominence in the administration of investor-State arbitrations, a smaller number of investor-State arbitrations is also administered by other arbitral institutions, most notably the International Court of Arbitration at the International Chamber of Commerce (ICC International Court of Arbitration). Indeed, according to the ICC, as of 2012 approximately 18% of BITs provided for the possibility of submitting a dispute to the ICC.²⁸⁸ However, while approximately 10% of ICC arbitrations involve a State, Parastatal or Public Entity, there is no publicly available record indicating that a significant number of these arbitrations are investor-State

²⁸⁴ *ST-AD GmbH v. Republic of Bulgaria*, UNCITRAL, PCA Case No. 2011-06, *Achmea B.V. v. The Slovak Republic*, UNCITRAL, PCA Case No. 2008-13 (formerly *Eureko B.V. v. The Slovak Republic*), *Antaris Solar and Dr. Michael Göde v. Czech Republic*, UNCITRAL, PCA; *InterTrade Holding GmbH v. The Czech Republic*, UNCITRAL, PCA; *OAQ Gazprom v. The Republic of Lithuania*, UNCITRAL, PCA; *U.S. Steel Global Holdings I B.V. (The Netherlands) v. The Slovak Republic*, UNCITRAL, PCA; and *European American Investment Bank AG v. The Slovak Republic*, UNCITRAL, PCA).

²⁸⁵ Information regarding pending investor-State arbitrations at the PCA is available on the PCA's website at: http://www.pca-cpa.org/showpage.asp?pag_id=1029.

²⁸⁶ The SCC in numbers – 2012, the SCC Statistical Report available on the SCC website at: <http://www.sccinstitute.com/?id=46833>. See also: 'The SCC Experience of Investment Arbitration under UNCITRAL Rules' available at: [http://www.sccinstitute.com/filearchive/4/46834/UNCITRAL%20Disputes The%20SCC%20Experience_AM.pdf](http://www.sccinstitute.com/filearchive/4/46834/UNCITRAL%20Disputes%20The%20SCC%20Experience_AM.pdf).

²⁸⁷ *Ibid.*

²⁸⁸ Commission on Arbitration, ICC Arbitration Commission Report on Arbitration Involving States and State Entities under the ICC Rules of Arbitration, March 17, 2014, 862 E, available at: <http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2012/ICC-Arbitration-Commission-Report-on-Arbitration-Involving-States-and-State-Entities-under-the-ICC-Rules-of-Arbitration/>.

arbitrations, rather than traditional commercial arbitrations involving a State, Parastatal or Public Entity.

WTO dispute settlement

For the purpose of this section “WTO dispute settlement” includes the following procedures: (1) arbitration under Article 25 of the Dispute Settlement Understanding (DSU) (which is rarely invoked in practice), (2) arbitration under Article 21 of DSU, which concerns determinations by arbitrators of whether a “reasonable period of time” has passed in which States were to adopt the rulings and recommendations of a WTO Dispute Settlement Body (DSB), and finally (3) the adjudication of complaints by WTO panels and the WTO Appellate Body, which constitute the major portion of the caseload of the WTO. While it can be questioned whether all of these procedures are properly characterised as “arbitration”, a broad interpretation of that term has been adopted here in order to maximise the information provided on arbitrations involving EU Member States.

Regarding the first procedure, arbitration under Article 25 of the DSU is an alternative method within the WTO dispute resolution, and involves WTO Member States selecting their own arbitrators and adopting their own rules of procedure. Consequently, it ultimately constitutes the incorporation of mainstream arbitration into WTO dispute resolution. This procedure has rarely been used.²⁸⁹

Concerning the second procedure, Article 21 of the DSU requires the immediate compliance by a WTO Member who was found in breach of a WTO obligation, with the ruling or recommendation issued by the DSB. If such compliance is “impracticable,” a Member is given a “reasonable period of time” to execute the DSU’s decision and such period of time should be proposed by the WTO Member itself and further approved by the DSB, agreed on by the parties to a dispute, or eventually determined by means of a binding decision of arbitrators. Of the 26 cases decided under this procedure from 1999-2013, the EU has participated in 13 cases as a third party,²⁹⁰ has acted as a complainant in 8 cases,²⁹¹ and has acted as a respondent in 3 cases.²⁹²

Regarding the third WTO procedure, which is the most common form of WTO dispute settlement, complaints are filed by one WTO Member against another, alleging that the latter party has breached one of its obligations under the WTO agreements. The complaining party first requests consultations with its counterpart, with a view to resolving the dispute through negotiation. If consultations do not succeed, a three-person panel will be constituted to adjudicate the dispute. Initially the WTO Secretariat will propose a panel, with parties to the dispute possessing the right to object to any proposed panellists. While such an objection should only be made if backed by compelling reasons, no review of an

²⁸⁹ See: the information provided by the WTO on its website under the Section on: “Dispute Settlement System Training Module Chapter 8: Dispute Settlement without recourse to Panels and the Appellate Body at: http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c8s2p1_e.htm.

²⁹⁰ These WTO proceedings resulted in the following arbitral awards: WT/DS414/12 (China – United States); WT/DS384/24, WT/DS386/23 (Canada – United States); WT/DS366/13 (Panama – Colombia); WT/DS344/15 (Mexico – United States); WT/DS336/16 (Republic of Korea – Japan); WT/DS322/21 (Japan – United States); WT/DS302/17 (Honduras – Dominican Republic); WT/DS285/13 (Antigua and Barbuda – United States); WT/DS268/12 (Argentina – United States); WT/DS264/13 (Canada – United States); WT/DS207/13 (Argentina – Chile); WT/DS202/17 (Republic of Korea – United States); WT/DS184/13 (Japan – United States)..

²⁹¹ These WTO proceedings resulted in the following arbitral awards: WT/DS332/16 (EC – Brazil); WT/DS75/16, WT/DS84/14 (EC – Republic of Korea); WT/DS87/15, WT/DS110/14 (EC – Chile); WT/DS114/13 (EC – Canada); WT/DS160/12 (EC – United States); WT/DS136/11, WT/DS162/14 (EC – United States); WT/DS155/10 (EC – Argentina); WT/DS217/14, WT/DS234/22 (Australia; Brazil; Chile; European Communities; India; Indonesia; Japan; Korea, Republic of; Thailand – United States).

²⁹² These WTO proceedings resulted in the following arbitral awards: WT/DS246/14 (India – EC); WT/DS265/33, WT/DS266/33, WT/DS283/14 (Australia – EC); WT/DS269/13, WT/DS286/15 (Brazil – EC).

objecting party's reasons is made, and hence parties are ultimately free to objection to any panellist they dislike. Where an objection is made, then Secretariat will propose a replacement. Should no agreement be reached on the composition of the panel within 20 days, either panel may request the Director-General of the WTO to appoint the panel directly. Although the Director-General will consult with the parties, the parties do not have the ability to object to the selections of the Director-General.

When a panel has made its decision, two forms of review are available. Firstly, the decision may be appealed to the WTO Appellate Body, which has the power to review the panel's decisions on legal questions, but not facts. Secondly, both panel reports and Appellate Body reports only become binding on the parties when they are formally adopted by the DSB. However, the DSB includes representatives of all WTO Member States, including the disputing parties, and a report will only not be adopted if all WTO Member States agree that it should not be adopted. As the DSB also includes a representative of the successful party in the dispute, it is highly unlikely that this will occur.

Both the EU and its Member States are members of the World Trade Organisation. As of August 2014, the EU has been a party to 172 dispute settlement cases, acting as both defendant and complainant. Of the 93 complaints launched by the EU, the USA was the most frequent respondent, followed by China, India, Canada, and Argentina. Of all 79 complaints submitted against the EU, again the USA was the most frequent complainant, followed by Canada, India, Argentina, and the Republic of Korea. The EU has also participated in 144 WTO cases as a third party, in which capacity it may monitor proceedings initiated by or against another parties.

As EU Member State is an individual WTO Member, questions arose after the entering into force of the Lisbon Treaty, which granted the EU exclusive powers in the area of the Common Commercial Policy (CCP), regarding the ability of Member States to continue participating in WTO dispute settlement in their individual capacity.²⁹³ This issue was resolved by the WTO panel in the so-called "Airbus" case, in which the panel confirmed that EU Member States do indeed retain their individual rights and obligations as WTO Members.²⁹⁴

It is nevertheless common practice for the EU to file submissions on behalf of EU Member States before WTO dispute settlement panels, even in individual claims brought against such States). Consequently, in most WTO cases in which EU Member States have been involved, they have acted jointly with the EU, although there is a relatively small number of WTO dispute settlement cases involving the lone participation of Member States.²⁹⁵ EU Member States have also acted as respondents alongside the EU in a few cases.²⁹⁶

Additionally, EU Member States and Switzerland have been involved in a small number of cases acting as third parties (usually together with the EU), with Switzerland most often performing this role.

²⁹³ This is also when the "European Communities" were replaced by the "European Union" within the WTO dispute settlement regime.

²⁹⁴ *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/R.

²⁹⁵ *United States v. Belgium*, DS210; *Hungary v. Croatia*, DS297; *United States v. Denmark*, DS83; *United States v. France*, DS173 (which concerned the identical complaint as was submitted against the EC in WT/DS172); *United States v. Greece*, DS125 (that concerned the same complaint as brought against the EC in WT/DS124); *Hungary v. Romania*, DS240; *Hungary v. Turkey*, DS256; *Czech Republic v. Hungary*, DS159; *United States v. Ireland*, DS82; *Poland v. Slovak Republic*, DS235; *Poland v. Czech Republic*, DS289; and *United States v. Romania*, DS198.

²⁹⁶ *United States v. European Communities*, France, Germany, Spain, United Kingdom, DS316; *United States v. European Communities*, France, Germany, Spain, United Kingdom, DS347; *China v. European Union*, Italy, Greece, DS452; *India v. European Union*, Netherlands, DS408; *Brazil v. European Union*, Netherlands, DS409.

There is, finally, also one WTO dispute settlement case that was initiated by a Member State against the EU (*Denmark v. European Union*, DS469), alleging “use of coercive economic measures in relation to Atlanto-Scandian herring”.

State-State arbitrations

Some EU Member States have also been involved in State-State arbitrations concerning claims under international law. For the purposes of the present study we are adopting a wide interpretation of what constitutes a State-State arbitration, and have included disputes before ongoing tribunals such as the International Court of Justice. While the ICJ differs significantly from a traditional arbitration tribunal, and it can certainly be questioned whether proceedings before the ICJ are indeed arbitrations, the jurisdiction of the ICJ is ultimately based on consent, judges from the ICJ regularly serve as arbitrators in other State-State arbitrations, and the role the ICJ plays in State-State dispute resolution is equivalent to that played by conventional State-State arbitration tribunals. Nonetheless, particular attention is paid here to disputes arbitrated under the auspices of the PCA, as these disputes most clearly represent genuine State-State arbitrations.

Because States are usually unwilling to subject themselves to the national courts of any other State, arbitration has long been the dominant mode of peaceful dispute resolution between States. State-State arbitrations can be conducted *ad hoc*, administered by institutions such as the PCA, or conducted before established tribunals such as the ICJ.

Because of the confidentiality made possible by *ad hoc* arbitration, it is difficult to provide even an approximate number of the *ad hoc* State-State arbitrations that are either concluded or pending. However, matters that have been decided in known *ad hoc* inter-State arbitrations include determinations of land and maritime boundaries, aviation rights, and state responsibility, among the others.²⁹⁷

Most publicly known State-State arbitrations are either held before the ICJ or administered by the PCA. Both the ICJ and the PCA provide some level of details regarding their historical caseload, however a significant number of PCA cases are not publicly disclosed. Consequently, there are serious limitations on the degree to which the caseload of the ICJ and the PCA can be used for any extrapolations regarding the total number of State-State arbitrations involving EU Member States and Switzerland since 1999.

Between 1999 and 2014 the ICJ determined 19 known State-State arbitrations involving Member States, including Germany, Spain, Portugal, the Netherlands, France, Belgium, Croatia, Romania, Italy, and the United Kingdom. In addition, Switzerland was a party to two known disputes determined by the ICJ within this period. The disputes concerned a variety of international law issues ranging from the legality of the use of force by one country in another State (e.g. six applications by Serbia and Montenegro against Portugal, the Netherlands, Italy, Germany, France, and Belgium) to criminal proceedings or mutual assistance in criminal matters (e.g. *Republic of the Congo v. France*, *Djibouti v. France*) and property claims (*Liechtenstein v. Germany*).

Regarding State-State arbitration under the auspices of the PCA, information is publicly available on four State-State arbitrations involving Member States/Switzerland concluded in the period between 1999 and 2014: *Ireland v. United Kingdom* (the “OSPAR” Arbitration), *Ireland v. United Kingdom* (the “MOX Plant Case”), *Belgium v. Netherlands* (the “Iron Rhine Arbitration”), and *Netherlands v. France* (the “Rhine Chlorides Arbitration”). Some details will be provided on these four cases, as a demonstration of the types of disputes that are resolved through State-State arbitration.

²⁹⁷ Böckstiegel, K-H. (2006).

The OSPAR arbitration concerned a dispute between Ireland and the United Kingdom relating to information disclosure regarding the Mox nuclear fuel plant Sellafield in Cumbria, UK.²⁹⁸ Ireland requested information regarding the Mox plant, under the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic, but the request was denied by the United Kingdom. The arbitral tribunal, in its final award of July 2, 2003, determined that Ireland had failed to sufficiently justify that disclosure of the information requested was required by the Convention.

The Mox Plant Case, again between Ireland and the United Kingdom, also related to the Mox nuclear fuel plant.²⁹⁹ This case focused on environmental issues, but was ultimately withdrawn by Ireland, on February 15, 2007, following consultations between the parties. The proceedings were formally terminated by the arbitral tribunal as of June 6, 2008.³⁰⁰

The Iron Rhine Arbitration, between Belgium and the Netherlands, arose out of the reactivation of the Iron Rhine railway line linking a port in Belgium and a basin in Germany via Dutch provinces. The dispute concerned whether Belgium had a legal right to reactivate the line. The arbitral tribunal in its award of May 24, 2005 determined that Belgium was entitled to reactivate the Iron Rhine railway, but that the two States would each be responsible for different parts of the related costs.

The Rhine Chlorides arbitration, involving the Netherlands and France, related to the interpretation of the Additional Protocol of 25 September 1991 to the Convention of 3 December 1976 on the Protection of the Rhine against Pollution by Chlorides. The dispute regarded the interpretation and implementation of a cost-sharing mechanism included in the Protocol, as well as the methodology to be used in the auditing of financial contribution made in advance by the Netherlands to France. The tribunal delivered its award on March 12, 2004.

Currently the PCA administers eight State-State arbitrations, which is the highest number of such cases simultaneously administered by the PCA in its history.³⁰¹ Three of eight active PCA State-State arbitrations concern the Member States/Switzerland.³⁰²

The first case, the 'Arctic Sunrise Arbitration', relates to a dispute between the Netherlands and Russia over the boarding and detention of the vessel 'Arctic Sunrise' within the exclusive economic zone of the Russian Federation, and the subsequent detention by the Russian authorities of persons from the Arctic Sunrise.³⁰³ The case was filed on October 4, 2013 under Annex VII of the United Nations Convention on the Law of the Sea.³⁰⁴ The tribunal held its first hearing on March 17, 2014, and the Netherlands was obligated to submit its Memorial on jurisdiction, admissibility and merits by August 31, 2014.

The second PCA-administered State-State arbitration in which Member States/Switzerland act as parties involves a maritime and territorial dispute between Croatia and Slovenia. This arbitration dates back to the dissolution of the former Yugoslavia in 1991 and involves

²⁹⁸ The Hague Justice Portal, Academic Research section on Ireland v. United Kingdom (MOX Plant Case), at: <http://www.haguejusticeportal.net/index.php?id=6164>.

²⁹⁹ The Hague Justice Portal, Academic Research section on Ireland v. United Kingdom (MOX Plant Case), at: <http://www.haguejusticeportal.net/index.php?id=6164>.

³⁰⁰ Since this part of the Study only analyses State-State arbitrations, the *Mox Plant* case before the CJEU will be mentioned in paragraph 3.2.3.3.

³⁰¹ Compare: the presentation entitled "What Role for the Permanent Court of Arbitration Today" by Hugo Siblescu of February 12, 2013 available at: pca-cpa.org/showfile.asp?fil_id=2110, where the presenter speaks about the record of the then 6 inter-state arbitrations administered by the PCA simultaneously in 2012.

³⁰² See: the information on pending PCA arbitrations available on the PCA website at: http://www.pca-cpa.org/showpage.asp?pag_id=1029.

³⁰³ The summary of the case is available on the PCA website at: http://www.pca-cpa.org/showpage.asp?pag_id=1556.

³⁰⁴ Ibid.

attempts by Slovenia to establish a direct corridor from its own territorial waters to international waters, as the former are otherwise boxed off from international waters by Croatian territorial waters.³⁰⁵ In November 2010 the two countries signed a bilateral agreement referring their dispute to an *ad hoc* arbitration tribunal and adopting the PCA's Optional Rules for Arbitrating Disputes between Two States.³⁰⁶ The arbitral tribunal established for this arbitration is currently conducting its deliberations prior to issuing an award.

The third PCA-administered State-State arbitration was initiated by the Republic of Mauritius against the United Kingdom, pursuant to Article 287 and Annex VII, Article 1 of the United Nations Convention on the Law of the Sea.³⁰⁷ The dispute centres on the legality of the establishment by the United Kingdom of a Marine Protected Area ("MPA") around the Chagos Archipelago (an area near Mauritius), and the resultant prohibiting of fishing and certain other activities within 200 nautical miles of the Chagos Archipelago. The tribunal held hearings regarding its jurisdiction in April and May 2014.³⁰⁸

Commercial arbitrations

States or state entities may enter into contracts in a commercial, rather than a sovereign, capacity and may as a result participate as a commercial actor in commercial arbitrations.³⁰⁹ It is, however, particularly challenging to identify the number of such arbitrations that have occurred or that are currently in process, as information on commercial arbitrations is often kept confidential. As a result, public information on both the very existence of commercial arbitrations involving States or State entities, as well as on their subject matter, can be very restricted, or even simply unavailable.

There is no single arbitral institution that administers commercial arbitrations involving States or State entities, and the institution used will depend on the agreement of the disputing parties. In addition, as just noted, statistics regarding such cases are unreliable. As a result, while some statistical information will be provided here, it should be remembered that any such information is inherently uncertain, and is always subject to correction. Additional information, supplied directly by certain arbitral institutions, has been included in the Annex.

The International Chamber of Commerce (ICC), the most prominent international commercial arbitration institution, issued in 2014 a Report on States, State Entities and ICC Arbitration ('the Report'), which indicates that approximately 10 per cent of the overall ICC caseload involves commercial or investment arbitrations with States or State entities as parties.³¹⁰ The Report further states that "the largest category of cases involving states or state entities" concerns claims arising out of commercial contracts.³¹¹ This information was confirmed in additional information supplied by the ICC to the authors of this study. However, no specific information was provided on the number of such disputes in which the State party was an EU Member State or Switzerland.

³⁰⁵ See: a post by Gary Born on Kluwer Arbitration blog of 20 July 2012 available at: <http://kluwerarbitrationblog.com/blog/2012/07/20/state-to-state-arbitration-at-the-permanent-court-of-arbitration/>.

³⁰⁶ Ibid.

³⁰⁷ *The Republic of Mauritius v. The United Kingdom of Great Britain and Northern Ireland*. The summary of a dispute is available at the PCA website at: http://www.pca-cpa.org/showpage.asp?pag_id=1429.

³⁰⁸ Press release dated May 16, 2014, available at: http://www.pca-cpa.org/showpage.asp?pag_id=1429.

³⁰⁹ By way of example, State A purchases some goods from a private company and the parties decide to include an arbitration clause in the sale agreement. In this context, State A is a party to a private law relationship and can generally be involved arbitration proceedings just like any other private party.

³¹⁰ Commission on Arbitration, ICC Arbitration Commission Report on Arbitration Involving States and State Entities under the ICC Rules of Arbitration, March 17, 2014, 862 E.

Two other institutions are particularly worth highlighting in this context, namely the Stockholm Chamber of Commerce (SCC) and the Vienna International Arbitral Centre (VIAC). The SCC and the VIAC have both traditionally served as leading institution for the administration of arbitrations between parties in Eastern Europe/Russia and parties in the west. Consequently, while clear statistic on this point are not available, both the SCC and the VIAC are likely administering institutions for commercial arbitrations involving Eastern European Member States or State entities.³¹²

However, while specific information in this context is difficult to get, given the prominence of the ICC as an arbitral institution in Europe it is unlikely that any arbitral institution in Europe administers commercial arbitrations involving States or State entities at a higher rate than the 10% reported by the ICC. This presumption is further confirmed by those institutions who filled out the questionnaires included in the Annex to this study.

Other arbitrations:

As arbitration is merely a dispute resolution mechanism, and has no substantive content, it can, of course be used to resolve disputes of any kind. Consequently, States and State entities can also be involved in arbitrations that do not fit easily into any of the above categories. A useful illustration in this context is the arbitral award of May 6, 2006 in *Maria V. Altmann and others v. Republic of Austria*. This arbitration related to the attempt by Maria Altman to recover from the Austrian National Gallery six Gustav Klimt paintings that were "confiscated" from Altman's uncle by the German Reich during the Second World War. The tribunal ordered that five of the six paintings be returned to Altman.³¹³

3.1.4. Arbitrations involving European State Bodies and European Union Law

The inclusion of ISDS mechanisms in BITs entered into by Member States has long been the subject of discussion among both academics and practitioners. This discussion has intensified since the adoption of the Lisbon Treaty,³¹⁴ Article 207(1) of which granted the European Union exclusive competence over foreign direct investment (FDI), including the negotiation of IIAs. While Section 4 of this Part will discuss in detail the theoretical issues raised by the interaction of investment arbitration and European Union law, this section will discuss those specific arbitrations in which such issues have already been addressed.

Investor-State Arbitrations under Intra-EU BITs and their Compatibility with EU Law

The shift of competence regarding FDI from Member States to the EU, resulting from the adoption of the Lisbon Treaty, raised a number of complex questions relating to the validity of already-existing intra-EU BITs, which had proliferated in 2004 and 2007 when 12 new countries from Central and Eastern Europe joined the EU. In other words, such BITs were originally born as extra-EU BITs, but then became intra-EU BITs when the non-EU contracting State became a party to the European Union. Since the adoption of the Lisbon Treaty the European Commission has begun to express concerns over the validity of these intra-EU BITs and has expressly argued that intra-EU BITs should eventually be terminated, as they contradict EU law: this position had already been expressed in the context of

³¹¹ Ibid.

³¹² LCIA Registrar's Reports 2012-13, LCIA Director General's Reports 2000-2011 available at the LCIA website at: http://www.lcia.org/LCIA/Casework_Report.aspx; The SCC in numbers – 2012, the SCC Statistical Report available on the SCC website at: <http://www.sccinstitute.com/?id=46833>. See also:

'The SCC Experience of Investment Arbitration under UNCITRAL Rules' available at: http://www.sccinstitute.com/filearchive/4/46834/UNCITRAL%20Disputes_The%20SCC%20Experience_AM.pdf

³¹³ Chorazak, M. J (2005).

³¹⁴ Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1 of 17 December 2007.

investor-State arbitration in *Eastern Sugar B.V. v. Czech Republic* (Partial Award of March 27, 2004; SCC No. 088/2004), which arose from the Netherlands-Czech Republic BIT.³¹⁵

In *Eastern Sugar* the Commission submitted two letters on this issue to be considered by the arbitral tribunal, but did not intervene as an *amicus curiae*. In these letters the Commission stated that EU law should automatically prevail over non-conforming provisions of BITs and that, in turn, these BITs should be terminated insofar as they overlapped with EU law.³¹⁶ The Commission justified this view by pointing to the possibility of unequal treatment of investors located in the European Union where one investor's State had signed a BIT with the Host State of the investment, while the other investor's State had not. Although the Commission did not clarify in the letters what the grounds of such inequality would be, some commentators argued that access to investor-State arbitration through the provisions of a BIT could constitute such preferential treatment.

The Commission also expressed concern due to the inability of investment arbitration tribunals to make applications for preliminary rulings to the Court of Justice of the European Union (CJEU). As a result, the Commission argued, such tribunals were less well positioned than domestic courts to decide on questions of EU law. The Commission's view was reiterated in two investor-state proceedings in which the Commission intervened as *amicus curiae*.³¹⁷

Investor-State arbitration tribunals, however, have on many occasions expressed the contrary opinion to that of the Commission. Arbitral tribunals addressed the interplay between EU law and investment law under intra-EU BITs (whether directly or indirectly) in several known investor-State arbitrations.³¹⁸ In each case the tribunal either upheld its jurisdiction or found that intra-EU BITs were still in force despite the Commission's claims.

In *Eastern Sugar v. Czech Republic*, SCC Case No 088/2004, the tribunal was required to determine if the Dutch investor, Eastern Sugar, had been discriminated against when the Czech authorities limited its sugar production quotas following the accession of the Czech Republic to the EU. The Czech Republic argued that the tribunal had no jurisdiction over the matter as the Netherlands-Czech Republic BIT, which underlay the investor's claim, should be rescinded because of the accession of the Czech Republic to the EU. The tribunal rejected these arguments, holding that the Czech Republic/Netherlands BIT and EU law did "not cover the same precise subject-matter". Specifically, the tribunal held that while EU law covered the investor's right to invest, the BIT covered the subsequent protection of the investor in the context of the investment. Consequently, the tribunal argued, there were no grounds for an automatic termination of the treaty under the relevant provisions of the Vienna Convention on the Law of Treaties (VCLT).³¹⁹

In *Eureko BV v. Slovak Republic*, which addressed the same BIT as in *Eastern Sugar* (to which the Slovak Republic had acceded upon its independence), the tribunal also denied that the BIT had been "displaced" or "disapplied" by EU law within the meaning of the

³¹⁵ *Eastern Sugar B.V. v. Czech Republic*, Partial Award of March 27, 2004; SCC No. 088/2004 available at: <http://italaw.com/documents/EasternSugar.pdf>.

³¹⁶ *Ibid.*

³¹⁷ *Electrabel S.A. (Belgium) v. Republic of Hungary* (ICSID Case No. ARB/07/19), and *AES Summit Generation Limited and AES-Tisza Erőmű Kft. (UK) v. Republic of Hungary* (ICSID Case No. ARB/07/22).

³¹⁸ *Eastern Sugar B.V. v. Czech Republic* (Partial Award of March 27, 2004; SCC No. 088/2004); *Eureko B.V. v. Slovak Republic*; *AES Summit Generation Ltd and AES-Tisza Erőmű Kft v Republic of Hungary* (ICSID Case No. ARB/07/22); *Electrabel S.A. (Belgium) v. Republic of Hungary* (ICSID Case No. ARB/07/19); and in *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania* (ICSID Case No. ARB/05/20), Decision on Jurisdiction of 24 September 2008.

³¹⁹ See: Partial Award in *Eastern Sugar v. Czech Republic*, *Eastern Sugar BV v. Czech Republic*, SCC Case No 088/2004, as cited also in: August Reinisch, *The EU on the Investment Path - Quo Vadis Europe? The Future of EU BITs and other Investment Agreements*, 12 Santa Clara J. Int'l L. 111 (2014), p. 149. Available at: <http://digitalcommons.law.scu.edu/scujil/vol12/iss1/6>.

VCLT.³²⁰ The arbitration concerned alleged detrimental treatment of the Dutch investor Eureko, which claimed that policy changes instituted by a new Slovak government in 2006 had ruined its investments in the Slovak Republic, in a manner inconsistent with the Netherlands-Slovak Republic BIT. The Slovak Republic argued that its accession to the EU made the BIT inapplicable. The tribunal ultimately confirmed its jurisdiction, holding both that the accession of the Slovak Republic to the EU did not automatically terminate the BIT.

AES Summit Generation Ltd and AES-Tisza Erőmű Kft v Republic of Hungary (ICSID Case No ARB/07/22) traced back to the privatization of the energy sector in Hungary in 1995, and the subsequent changes to the price regime of certain power generators after the accession of Hungary to the EU in 2004. AES Summit Generation Ltd (AES) was an English company that had invested in Hungary's power generation sector after that sector's privatization. It alleged that two government price decrees had violated the legitimate expectations of AES regarding the business environment in which it was investing, based on prior statements by the Hungarian government, in a way that constituted a breach of the Energy Charter Treaty. Hungary argued that the new pricing regime was a function of the European Commission's demands to minimise state aid in the energy sector and that AES could not have expected Hungary to contravene the EU competition law regime. The tribunal determined that Hungary did not breach the provisions of the ECT. Regarding the possible significance of the EU competition law regime, the tribunal stated that EU law "has a dual nature: on the one hand, it is an international law regime, on the other hand, once introduced in the national legal orders, it is part of these legal orders". This dual nature was particularly significant because according to the tribunal, once EU law has been incorporated into domestic law it becomes subject to the traditional international law rule that "a state may not invoke its domestic law as an excuse for alleged breaches of its international obligations". EU law, then, could not excuse any action taken by Hungary in violation of the ECT, although the tribunal did allow that the requirements of EU law could be considered when determining whether Hungary's actions were rational, reasonable, arbitrary or transparent, in so far as this affected its liability under the ECT.

*Electrabel S.A. v the Republic of Hungary (ICSID Case No. Arb/07/19)*³²¹ also arose from changes in Hungary's power pricing regime, as well as from a decision by Hungary to terminate a power purchase agreement with the Hungarian subsidiary of Electrabel, a Belgian company. As a result, the arbitration also involved questions relating to state aid restrictions under EU competition law. Although neither of the parties to the dispute questioned the jurisdiction of the arbitral tribunal, the Commission, who intervened as an *amicus curiae*, did. Specifically, the Commission argued that the claims underlying the arbitration, in so far as they related to EU law, fell within the exclusive jurisdiction of EU courts. The tribunal rejected the Commission's argument, arguing that the claim brought by Electrabel concerned violation of the ECT, not of EU law, and thus did not fall within the exclusive jurisdiction of EU courts. Moreover, the tribunal argued, by becoming a party to the ECT, the EU itself had agreed to the submission of disputes under the ECT to the ECT's arbitral dispute resolution mechanism. In so far as this required the tribunal to interpret EU law, this was also something often done by other international courts and tribunals.

Finally, *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania (ICSID Case No. ARB/05/20)* concerned a claim by Ioan and Viorel Micula, brothers who had invested in several drink factories in Romania, along with related entities, that Romania's revocation of certain incentives for investment in underdeveloped regions in Romania violated the promise of fair and equitable treatment

³²⁰ *Eureko BV v. The Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension (Oct. 26 2010).

³²¹ ICSID Case No. Arb/07/19, Decision on Jurisdiction, Applicable law and Liability, 30 November 2012 available online at: <http://www.italaw.com/sites/default/files/case-documents/italaw1071clean.pdf>

contained in the Swedish-Romanian BIT, as the investments had been made with the expectation that the incentives would be maintained for a 10 year period. Romania argued that it was obligated to revoke these incentives by the terms of its accession to the EU. The Commission intervened as *amicus curiae* on behalf of Romania, arguing that the tribunal should take EU state aid law into account when reaching its decision. The tribunal agreed that EU law was relevant to whether or not the EU had violated the BIT's fair and equitable treatment clause, although as part of the factual matrix, rather than by affecting the applicable law. Ultimately, however, the tribunal determined that Romania did indeed breach the fair and equitable treatment provision in the BIT, based primarily on the fact that although Romania had phased out the incentives, it had retained certain of the claimants' related obligations.

In all of the above decisions the arbitral tribunal rejected the supremacy of EU law over the obligations included in the applicable BIT. One on level this is unsurprising, as arbitral tribunals understand their role as interpreting the obligations included in the BIT under which the tribunal was constituted. As a result, they will only see EU law as applicable to the extent that it comes under the terms of the BIT. The fact that both parties to the BIT are Member States of the European Union may be a relevant factual consideration, as can be seen in *Micula*, but it will not be found to affect the applicable law, absent a provision in the BIT making EU law applicable. It can be expected that future tribunals will maintain the rejection of the supremacy of EU law seen in the above decisions. Consequently, it will remain possible to bring claims under intra-EU BITs, even for actions taken by a State that were required by its EU obligations.

Investor-State Arbitrations under Extra-EU BITs after the Lisbon Treaty

Member States have also entered into BITs with non-Member States, known as extra-EU BITs. The prevailing issue regarding this kind of BIT arose upon the entry into force of the Lisbon Treaty, which granted the EU exclusive competence over foreign direct investment. This created uncertainty regarding the legal status of already-existing extra-EU BITs, as well as regarding the ability of Member States to enter into BITs in the future.

This uncertainty was resolved with the adoption of Regulation No. 1219/2012, which came into force on January 9, 2013 (Grandfathering Regulation). Under the grandfathering regulation, extra-EU BITs signed before January 1, 2009, or before a Member State's accession to the EU, remain in force, subject to case-by-case review by the Commission, until they are replaced by an agreement between the EU and the non-Member State counterparty. In addition, extra-EU BITs signed between December 1, 2009 (the date on which the Lisbon Treaty entered into force) and January 9, 2013 (the date on which the grandfathering regulation entered into force) could be maintained upon permission of the Commission. Finally, the grandfathering regulation establishes a framework within which Member States may negotiate and enter into new extra-EU BITs.

Notably, however, the grandfathering regulation addresses only "bilateral" agreements, and consequently does not apply to the Energy Charter Treaty, which serves as the basis of a number of pending investor-State arbitrations. It remains to be seen what the Commission's policy regarding the ECT will be.³²²

³²² Kleinheisterkamp, J. (2011).

References by Arbitral Tribunals to the Court of Justice of the European Union for Preliminary Rulings

Under Article 267 of the Treaty on the Functioning of the European Union (TFEU), “courts or tribunals of a Member State” are permitted to refer questions of EU law to the Court of Justice of the European Union (CJEU) for a preliminary ruling. This enables that court or tribunal to decide the case before it after receiving an authoritative interpretation of EU law. The complication from the perspective of arbitration is that even though arbitral tribunals deliver legally binding decisions that can be enforced in court, and that may involve questions of EU law, the CJEU has traditionally treated commercial arbitration tribunals as not a “tribunal of a Member State” under Article 267 TFEU. As a result, commercial arbitration tribunals have not been permitted to submit questions of EU law to the CJEU for a preliminary ruling.

This rule was established in *Case C-102/81 ‘Nordsee’ Deutsche Hochseefischerei* [1982] ECR 1095, in which the European Court of Justice (ECJ) dismissed an application for a preliminary ruling from an arbitral tribunal, on the ground that the an arbitration tribunal constituted pursuant to an arbitration agreement is ultimately a private tribunal, basing its jurisdiction on the consent of the parties, and cannot therefore constitute a “tribunal of a Member State”.

The court used for its decision *Case 61/65 Vaassen (née Göbbels)* [1966] ECR 261, in which five criteria had been elucidated for a tribunal to constitute a “tribunal of a Member State” under Article 267 TFEU: (1) the tribunal must be provided for by law; (2) it must be permanent; (3) it must respect the requirements of due process; (4) it must apply rules of law; and (5) it must exercise compulsory jurisdiction over parties appearing before it.

Preliminary references from arbitral tribunals were also rejected by the CJEU in other cases.³²³

Importantly however, in the 1989 *Danfoss* case³²⁴ the ECJ accepted a preliminary question from an industrial arbitration body, on the ground that the arbitration in question was mandatory (i.e. not based on party consent), and the tribunal issued a final and binding decision: “An industrial arbitration board then hears the dispute at last instance. Either party may bring a case before the board irrespective of the objections of the other. The board’s jurisdiction thus does not depend upon the parties’ agreement.”

On February 13, 2014, however, in *Case C-555/13 Merck Canada Inc.*, the CJEU accepted a preliminary reference from an arbitration tribunal, after an evaluation of the specific features of the tribunal in question. Importantly, this does not mean that the CJEU has now rejected its traditional rule, as the Court reiterated clearly in *Merck* that a “conventional” arbitration tribunal does not constitute a “court or tribunal of a Member State” under Article 267 TFEU. However, it is now clear that the CJEU will accept a preliminary reference from an arbitral tribunal where the characteristics of that tribunal make it adequately resemble a “court or tribunal of a Member State”.

In *Merck Canada Inc.*, the request for a preliminary reference had been made by a Portuguese *Tribunal Arbitral necessário*, in proceedings between *Merck Canada Inc.* and *Accord Healthcare Ltd, Alter SA, Labochem Ltd, Synthon BV and Ranbaxy Portugal — Comércio e Desenvolvimento de Produtos Farmacêuticos, Unipessoal Lda*.³²⁵ The question referred to the CJEU by the tribunal concerned the interpretation of Article 13 of Regulation

³²³ *Case C-126/97 Eco Swiss* [1999] ECR I-3055, *Miles and others v Ecoles Europeennes* (*Case C-196/09*) [2011] ECR I-5139, and *Case C-125/04 Denuit and Cordenier* [2005] ECR I-923.

³²⁴ ECJ Judgment of 17 October 1989, *Case 109/88, Handels- og Kontorfunktionærernes Forbund I Danmark v. Dansk Arbejdsgiverforening, acting on behalf of Danfoss* [1989] ECR 3199.

³²⁵ *C-555/13 Merck Canada Inc.* [2014] EUECJ C-555/13, paragraph 2.

(EC) No 469/2009 of the European Parliament and of the Council of 6 May 2009, concerning a supplementary protection certificate for medicinal products.³²⁶

Addressing the criteria adopted in *Vaassen*, the CJEU first emphasised that the jurisdiction of the *Tribunal Arbitral necessário* arose from Portuguese legislation relating to industrial property rights (Law No 62/2011 of 12 December 2011), rather than the will of the parties.³²⁷ In addition, the CJEU noted that there was no appeal mechanism available from decisions by the tribunal, meaning that the decision of the *Tribunal Arbitral necessário* was equivalent to a judgment delivered by an ordinary court.³²⁸ The CJEU also confirmed that arbitrators on the tribunal are required to be independent and impartial and to observe the principle of equal treatment of the parties, and in this respect are again equivalent to judges in national courts.³²⁹ The CJEU also noted that the tribunal applied rules of law, as would a national court.

The CJEU then turned to the most problematic characteristic of the *Tribunal Arbitral necessário* with respect to its qualification as a “tribunal” under TFEU 267, namely the permanent nature of its mandate. Specifically, the CJEU noted that, unlike a national court, the tribunal could vary in form and composition, the procedural rules that it used were subject to the choice of the parties, and the tribunal was dissolved following the rendering of an award.³³⁰ Arguably, that is, the tribunal did not meet the requirement in *Vaassen* of permanence.

Nonetheless, despite these divergences from the traditional model of a “court or tribunal of a Member State”, the CJEU held that the requirement of permanence was also met because of the broader legislative context in which the tribunal was established and operated, which both established its permanent jurisdiction and framed the applicable procedural rules.³³¹ As a result, the tribunal’s request for a preliminary reference was accepted.

The CJEU’s decision in Case C-555/13 *Merck Canada Inc.* is important not only because it confirms that arbitral tribunals can, under certain circumstances, submit a request for a preliminary ruling to the CJEU, but also because it clarifies and analyses in detail the formal requirements arbitral tribunals must meet if they are to request a preliminary ruling from the CJEU.

Questions regarding the admissibility of preliminary references from arbitral tribunals have recently intensified following cases such as *Electrabel S.A. v the Republic of Hungary* (ICSID Case No. Arb/07/19)³³², in which investment arbitration tribunals have held that they possess the power to interpret and apply EU law. Indeed, some academics have argued that the particular characteristics of investment arbitration tribunals, as opposed to commercial arbitration tribunals, could indeed qualify them as “tribunals of a Member State” under Article 267 TFEU.³³³

It is highly questionable whether this is indeed correct, and no investment arbitration tribunal has yet attempted to submit a preliminary reference to the CJEU. However, given the ongoing public concern regarding the potential public policy impacts of investment arbitration, legislative action clarifying that investment arbitration tribunals may submit preliminary references to the CJEU, combined with the incorporation into IIAs to which the

³²⁶ Ibid., paragraph 1.

³²⁷ Ibid., paragraph 19.

³²⁸ Ibid.

³²⁹ Ibid., paragraph 23.

³³⁰ Ibid., paragraph 24.

³³¹ Ibid., paragraph 25.

³³² ICSID Case No. Arb/07/19, Decision on Jurisdiction, Applicable law and Liability, 30 November 2012 available online at: <http://www.italaw.com/sites/default/files/case-documents/italaw1071clean.pdf>

³³³ M, Olík, and D Fyrbach, (2011).

EU or Member States are party a requirement that such references must be submitted by tribunals, should be seriously considered.

3.2. Sources of International Investment Law within the European Union

3.2.1. Introduction

3.2.1.1. A Complex Framework of Legal Instruments

The legal regime of international investment is shaped by a complex framework of instruments, such as Bilateral Investment Treaties (BITs) and multilateral International Investment Agreements (IIAs). Since the entry into force of the Treaty of Lisbon, the Treaty on the Functioning of the European Union (TFEU) enshrines the EU's exclusive competence in the field of Foreign Direct Investment (FDI). In particular, Article 207 TFEU states that FDI is part of the Union's Common Commercial Policy (CCP), which, pursuant to Article 3(1)(e) TFEU, falls within the exclusive competence of the Union.³³⁴

The aforementioned legal framework has a fundamental consequence on the sources of International Investment Law within the European Union, as future agreements concerning the protection of investments and the liberalisation of trade will not be negotiated and concluded by Member States on their own, but rather by the Union. This new generation of investment treaties will play a crucial role in redefining the landscape of the sources of International Investment Law; however, it is impossible to understand the law of international investment without considering the existing network of agreements, which, in principle, remain in effect and currently determine the applicable standards of protection.³³⁵ Since the first BIT between Germany and Pakistan in 1959, Member States have concluded over 1,300 BITs, aimed at enhancing FDI flow and, ultimately, promote the economies of the contracting States. In light of this, it is first of all necessary to analyse the legal status and effectiveness of Member States' BITs.

3.2.1.2. Existing BITs in the European Legal Order

The circumstance that Member States have concluded a high number of BITs over the past decades does not come without consequences, as a complex system of obligations arises from the aforementioned agreements. In the context of the European Union, the problem is made more complicated by the fact that Member States also need to comply with their obligations under EU Law, in accordance with the system set forth in the Treaties. Whilst the problem of conflicting substantive standards of protection in international investment law and EU law will be addressed in Chapter 5, this Chapter analyses the problem of the current regime of Member States' BITs. Because of the possible interplay between international investment law and EU law, it is necessary to differentiate between BITs concluded between a Member State and a third State, and BITs concluded between two Member States. The former are commonly referred to as extra-EU BITs, whilst the latter are usually named intra-EU BITs.

There are several reasons why these two scenarios need to be studied separately. Firstly, extra-EU BITs involve the participation of a non-Member State and, therefore, from the point of view of the Union, they fall within the notion of FDI, which is now part of the CCP. On the other hand intra-EU BITs, being only binding between two Member States, cannot (at least from a EU perspective) be considered as international instruments concerning foreign investments, but rather are internal agreements, potentially conflicting with the EU

³³⁴ The consequences of Article 207 TFEU on international investment law in the European Union are analysed by Burgstaller, M. (2009), at 181.

³³⁵ For a description of the sources of international investment law see Gazzini, T. and De Brabandere, E. (2012).

Treaties and with secondary legislation. Secondly, extra-EU BITs remain into force until their expiry or termination, whilst the problem of the ongoing validity of intra-EU BITs is much more controversial and still unsettled. This Chapter will first address the legal regime of extra-EU BITs (para. 4.2.) and then describe the issues arising from intra-EU BITs (para. 4.3.).

3.2.1.3. The Union's Existing International Investment Agreements

Although Article 207 TFEU opens new perspectives for a European FDI policy, the EU is not completely new to IIAs: even before the entry into force of the Treaty of Lisbon, FDI has played an important and expanding role in the Union's external relations. Therefore, the final part of this Chapter will describe the development of pre-Lisbon EU international investment law, whilst the future landscape, with specific regard to Investor-State Dispute Settlement (ISDS), will be described in Chapter 6.

3.2.2. Extra-EU BITs

3.2.2.1. The problem of possible inconsistencies between Extra-EU BITs and EU law

In principle, the existing extra-EU BITs remain in force and will thus continue to have binding effects on contracting States, until they are substituted by new agreements concluded by the EU. In this regard, Article 46(1) of the Vienna Convention on the Law of Treaties (VCLT) provides that no State can invoke a violation of its internal law regarding competence to conclude treaties (such as the new Article 207 TFEU) as invalidating its consent to be bound. Accordingly, Article 351 TFEU states that the rights and obligations arising from pre-accession agreements concluded between Member States and third States are not affected by the provisions of the EU treaties, although Member States must take all appropriate steps to eliminate any established incompatibility between such agreements and the treaties. Therefore, it can be concluded that Member States are still bound by extra-EU BITs.

The contents of extra-EU BITs have caused concerns in the EU,³³⁶ as BITs afford standards of protection which are not necessarily in line with EU law; moreover, these potential inconsistencies cannot always be overcome with the harmonising interpretation of the Court of Justice of the European Union (CJEU), because ISDS mechanisms are not part of the judicial system of Member States. Even before FDI became an exclusive competence of the Union, the Commission has taken initiatives aimed at avoiding conflicts between EU law and the international obligations of Member States.

3.2.2.2. The Commission's Initiatives to Ensure Consistencies in the Pre-Lisbon Era

In several occasions, the Commission has acted in its role of "guardian of the Treaties", in order to ensure the consistency between European BITs and EU law. In 2003, the Commission negotiated a Memorandum of Understanding with the United States;³³⁷ this way, the Commission aimed at adapting the international obligations of States acceding the EU vis-à-vis the United States, bringing them in line with mandatory provisions of EU law. The general goal of the Commission was to preserve the ability of the Union to regulate some crucial sectors of the Internal Market in accordance with the EU founding treaties.

³³⁶ The Commission has sent letters to Finland on 7 May 2004 and to Austria and Sweden on 12 May 2004, urging these Member States to terminate some of their BITs for reasons on incompatibility with EU law.

³³⁷ Understanding Concerning Certain U.S. Bilateral Investment Treaties, signed by the U.S., the European Commission, and acceding and candidate countries for accession to the European Union (September 22, 2003), <http://www.state.gov/s/l/2003/44366.htm>

The problem of possible incompatibilities between BITs and EU law has been further addressed by the Commission in the proceedings started against Austria, Sweden and Finland in 2004.³³⁸ Before their accession to the EU (EC at the time), these countries had entered into BITs which afforded foreign investors the right to a free transfer of the capital connected with their investment, without any restriction. Although this free transfer standard is apparently analogous to the concept of free movement of capital, one of the basic pillars enshrined in the EU Treaties, the latter can be restricted by Member States or by the Union, whilst the former does not contain such a possibility. According to the Commission, the mere fact that the free transfer clauses contained in the three States' BITs did not provide for the possibility of restrictions constituted a breach of EU law. The Court of Justice upheld this position and concluded that Austria, Sweden and Finland had to remove the incompatibility between their duties under EU law and their international obligations under the respective BITs. However, the Court has also expressed a different position, in an infringement case against Slovakia:³³⁹ this time the Court concluded that the Slovak Republic was not in breach of its obligations under EU law, since the BIT it had concluded before its accession to the Union did not include a denunciation clause. Therefore, in this particular situation, denouncing the treaty could not qualify as an 'appropriate step' towards the elimination of incompatibilities between earlier treaties and the EU treaties.

After the entry into force of the Treaty of Lisbon and the inclusion of FDI in the CCP, the commission took further action in order to ensure the compatibility between the existing framework of BITs concluded by Member States and EU law. In particular, in July 2010, the Commission proposed a draft Regulation, aimed at establishing transitional arrangements for Extra-EU BITs.³⁴⁰ The rationale of said proposal was to enable the Commission to manage (or "grandfather") the existing treaties, until their progressive replacement with the new generation of agreements concluded by the Union itself. The Regulation entered into force on 9 January 2013.³⁴¹

3.2.2.3. Overview of the Grandfathering Regulation

Recital 5 of Regulation no. 1219/2012 (commonly referred to as "Grandfathering Regulation") states that, although bilateral investment agreements remain binding on the Member States under public international law and will be progressively replaced by agreements of the Union, the conditions for their continuing existence and their relationship with the Union's investment policy require appropriate management. Therefore, the Regulation aims at combining legal certainty for foreign investors with the need to implement the transition to the new system of CCP. It is interesting to notice that the Commission could have exerted this "treaty management" function without such a Regulation, similarly to what had happened with pre-accession BITs concluded by Austria, Sweden and Finland. In other words, the Commission could have simply asked Member States to renegotiate or terminate their BITs, where in conflict with EU law or with the possibility of future negotiations of new agreements, starting infringement proceedings in case of non-compliance. Regulation 1219/2012, instead, enucleates a procedure of management, which streamlines the resolution of conflicts between EU law and international investment law. Nevertheless, the possibility of infringement proceedings remains as a last resort, as expressly stated in Recital 11 of the Regulation.

³³⁸ Case 205/06 *Commission/Republic of Austria* [2009] ECR I-1301; Case C-249/06 *Commission/Sweden* [2009] ECR I-1335; Case C-118/07 *Commission/Finland* [2009] ECR I-10889.

³³⁹ *Commission v. Slovakia*, ECJ, 15 September 2011, Case C-264/09.

³⁴⁰ The contents of the proposal are analysed by Kleinheisterkamp, J. (2011b), at 212.

³⁴¹ Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, OJ L 351, 20.12.2012.

Regulation no. 1219/2012 distinguishes between three types of Extra-EU BITs:

1. BITs concluded before 1 December 2009 (date of entry into force of the Treaty of Lisbon) or before the date of accession of the signatory Member State, whichever is later;
2. BITs concluded between 1 December 2009 and 9 January 2013 (date of entry into force of the Grandfathering Regulation);
3. Future BITs, to be concluded or renegotiated after the entry into force of the Regulation.

For each category of BITs, the Regulation sets forth a transitional regime.

3.2.2.4. BITs concluded before the entry into force of the Treaty of Lisbon

Article 2(1) of the Regulation provides that BITs concluded before the entry into force of the Treaty of Lisbon, which Member States wish to maintain in force or permit to enter into force, must be notified to the Commission by 8 February 2013.³⁴² These BITs will, in principle, be maintained in force until a bilateral investment agreement between the Union and the same third country enters into force. After the notification, however, the Commission has the power to assess the BIT, evaluating whether its provisions constitute “a serious obstacle to the negotiation or conclusion by the Union” of future BITs with third States (Article 5). In other words, the “managing” role of the Commission is aimed at ensuring that pre-existing BITs do not hinder the future development of the CCP and the progressive substitution of the existing investment agreements with new instruments, negotiated by the Union directly by virtue of its exclusive competence, pursuant to Article 207 TFEU.

It must be noted that, as far as the ongoing validity of BITs is concerned, the Regulation is not consistent, as on the one hand it states that the existing BITs maintain their validity under public international law (Recital 5), but on the other hand suggests that the BITs must be notified, in order to stay in force (Article 2(1)). Therefore, it must be concluded that, whilst the Regulation does not affect the binding effect of existing BITs on Member States *per se*, it sets forth a mechanism which is uniquely internal to the EU, as a consequence of the shift of competence from Member States to the Union in the field of FDI.

If the Commission establishes that a notified BIT falls within the definition of “serious obstacle” of Article 5, it enters into consultations for a maximum of 90 days with the contracting Member State, in order to identify a solution. Within 60 days of the end of consultations, the Commission can indicate the appropriate measures, which the Member State must take in order to remove the obstacle. For example, the Commission could ask the Member State to negotiate the introduction of limitations to capital transfers, in accordance with EU law.

3.2.2.5. BITs concluded between 1 December 2009 and 9 January 2013

Similarly to pre-Lisbon BITs, BITs concluded between 1 December 2009 and 9 January 2013 must be notified to the Commission by 8 February 2013, if the signatory Member State wishes to maintain them in force or permit them to enter into force. Within 180 days

³⁴² The list of notified BITs is available at

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:131:0002:0098:EN:PDF> (accessed 1 September 2014).

of the receipt of the notification, the Commission makes an assessment as to whether the treaty is:

1. in conflict with EU law;
2. superfluous, because the Commission plans to negotiate an investment treaty with that particular third country;
3. inconsistent with the Union's principles and objectives for external action;
4. a serious obstacle to the negotiations or conclusion of a new investment treaty by the Union.

If the Commission finds that the notified BIT does not fall under any of the aforementioned categories, it grants an authorization for the maintenance or entry into force of the agreement under EU law. On the contrary, if such an authorization is not granted, the Member State must not take any further step towards the conclusion of the agreement, and must withdraw or reverse the steps which have already been taken. It must be noted that the wording of the Regulation is broad and, therefore, leaves the Commission a significant discretionary power in its assessment.

3.2.2.6. Future BITs

The Regulation aims, in principle, at avoiding any further negotiation of BITs by Member States, in light of the exclusive competence of the Union in the field of FDI under Article 207 TFEU. For this reason, Article 7 of the Regulation states that Member States can only enter into negotiations with a third State to amend an existing BIT or to conclude a new one, if they have been authorized by the Commission. This provision clearly reflects the managing role of the Commission: the authorization mechanism allows the Commission to control the future evolution of international investment law and, therefore, to preserve the EU's future policy space in the field of FDI.

If a Member State wants to enter into negotiations with a third State, it must notify its intention to the Commission, at least five months before the commencement of the formal negotiations. The Commission makes a decision as to the authorization to open formal negotiations within 90 days of receipt of the notification. The assessment of the Commission is based on the same criteria which regulate the maintenance in force of BITs concluded between 1 December 2009 and 9 January 2013 (see *supra*). After analysing the relevant documentation, the Commission can also require the Member State to include or remove any clauses of the prospective treaty, in order to ensure consistency with the EU's investment policy and compatibility with EU law.

Where the Member State has been authorized to open negotiations, the Commission maintains a constant monitoring role on the treaty-making process. First of all, the negotiating Member State must keep the Commission informed at all times and the Commission can request to participate in the negotiations directly, in order to ensure that the guidelines set forth in the authorization are respected throughout the different stages of the process. Moreover, after the negotiations are concluded, the Member State must notify the outcome to the Commission and transmit the text of the draft agreement. The Member State cannot sign the treaty, until the Commission has granted an authorization in this regard. The Commission takes a decision within 90 days, assessing once again whether the agreement is consistent with the criteria set forth in the Regulation. Therefore, as far as future BITs are concerned, the Commission runs two parallel tests: a first one before the formal negotiations are open and a second one before the agreement is signed. Through this mechanism, the Grandfathering Regulation ensures full consistency between the

rationale which has led to the granting of an authorization to open formal negotiations and the final outcome of said negotiations.

3.2.2.7. Conduct of Member States

With regard to existing extra-EU BITs, Member States are involved in a number of activities related to their execution and management. In particular, they take part in meetings with the contracting third State, as provided for in the applicable BIT, and they are involved in ISDS procedures, started against them by foreign investors of third contracting States. In view of the shift of competences enshrined in Article 207 TFEU, the Regulation addresses the problem of the conduct of Member States involved in these activities, establishing a duty of collaboration with the Commission. The rationale of these provisions is, once again, to enable the Commission to oversee the consistent application of EU law and the successful implementation of the Union's policies.

Member States must inform the Commission of all meetings taking place under the provisions of a BIT. In particular, Member States have the duty to provide the Commission with the agenda of the meeting and all relevant information concerning the topics to be discussed. If the discussion can affect the implementation of the CCP, the Commission can require the Member State to take a particular position at the meeting. Thanks to this provision, the Commission can ensure that the application of existing BITs by Member States does not hinder the development of a future commercial policy by the Union as a whole.

Member States must inform the Commission of any representation made to them that a particular measure they have taken is inconsistent with a BIT, as well as of any request for dispute settlement filed under the provisions of a BIT. The rationale of this provision is that, although the claims are brought against a single Member State, the reaction of said Member State should be consistent with the Union's law and policies. Therefore, the Member State and the Commission must cooperate and take all necessary measures to ensure an effective defence. The Regulation also states, at Article 11(1)(c), that this duty of cooperation "may include, where appropriate, the participation in the procedure of the Commission". The meaning of this provision is problematic, because the Union is not a party to the existing Extra-EU BITs falling within the scope of application of the Grandfathering Regulation, and therefore is not, in principle, entitled to participate to the dispute settlement proceedings as a party. It would be possible, on the contrary, to envisage the participation of the Commission to investment arbitrations under extra-EU BITs as an *amicus curiae*. *Amici curiae* are non-parties, which participate in the arbitration proceedings not to pursue or resist claims asserted therein, but to assist the tribunal in the decision-making process, offering a specific area of expertise. In fact, the Commission has in the past been allowed to submit *amicus curiae* briefs in investment arbitrations in *AES v. Hungary*³⁴³ and *Electrabel v. Hungary*.³⁴⁴ *Amici curiae* are increasingly allowed in investment arbitration, as they enable arbitral tribunals to hear all interested stakeholders in the case at hand.³⁴⁵ However, there are significant doubts as to the compatibility of an *amicus curiae* submission with the role of cooperation set forth in Article 11(1)(b) of the Grandfathering Regulation.³⁴⁶ First of all, *amici curiae* should in principle be independent from both parties and willing to intervene with the sole purpose of helping the tribunal understand certain issues involved in the dispute. From this point of view, the duty of cooperation between the Commission and the respondent Member State does not seem to

³⁴³ AES Summit Generation Limited & Another v. Republic of Hungary, ICSID Case No. ARB/07/22, Award, 23 Sep. 2010, para. 8.2.

³⁴⁴ *Electrabel SA v. Republic of Hungary*, ICSID Case No. ARB/07/19, para. 1.18.

³⁴⁵ Bastin, L. (2014), at 125.

³⁴⁶ Kasolowsky, B. and Harvey, C. (2013).

be compatible with the impartiality of an *amicus curiae*, which should not openly support one of the parties' strategy. Moreover, given the confidential nature of arbitration, the participation of *amici curiae* to arbitral proceedings is usually limited to the submission of a relatively short brief to the tribunal and access to the hearings is only permitted with the consent of all disputing parties. In light of this, it is not clear how the Commission could, at the same time, participate directly as an *amicus curiae* in arbitrations under the existing extra-EU BITs and cooperate with the respondent Member State to ensure an effective defence.

Member States have the same duty of information and cooperation towards the Commission when they intend to activate a dispute settlement mechanism included in an extra-EU BIT themselves. In this regard, Article 13(1)(c) of the Grandfathering Regulation states that Member States must seek the agreement of the Commission before activating the mechanism. The Commission will, once again, cooperate in the conduct of the procedures and participate in them, where appropriate.

3.2.3. Intra-EU BITs

3.2.3.1. The Genesis of Intra-EU BITs and the Problem of Their Ongoing Validity

Intra-EU BITs are investment treaties concluded between two Member States. As such, they are not directly affected by the shift of competence enshrined in the inclusion of FDI in the CCP under Article 207 TFEU, which only concerns relations between the Union and non-EU States. In addition, it must be considered that intra-EU BITs fall expressly outside of the scope of application of the Grandfathering Regulation, which only applies to investment agreements concluded between a Member State and Third Country. Therefore, the transitional regime set forth in the Regulation does not cover Intra-EU BITs, whose ongoing validity after the entry into force of the Treaty of Lisbon is highly debated.

Member States have concluded more than 170 intra-EU BITs. These agreements were generally born as extra-EU BITs, concluded between a Member State and a third State, which later acceded to the EU. In particular, the majority of these treaties were concluded between EU States and former socialist States, in order to enhance foreign investments in the newly opened markets.

The underlying problem of intra-EU BITs is the relationship between public international law (and, in particular, international investment law) on the one hand, and EU law on the other hand.³⁴⁷ Investment agreements deal, to a great extent, with subject matters which are also covered by EU law, such as the aforementioned free movement of capitals. Whilst the differences in substantive standards of protection between international investment law and EU law will be analysed in detail in Chapter 5, it is important to underline from the outset that these two categories of legal sources can potentially enter into conflict. Moreover, the existence of intra-EU BITs could amount, from the point of view of EU law, to discrimination between EU citizens, and therefore run contrary to Article 18 TFEU. BITs afford foreign investors standards of protection which are not necessarily the same as the ones included in EU law. Therefore, foreign investors from a Member State which concluded a BIT with the host State could be treated differently than investors coming from another Member State, who could only rely on the protections provided for in EU law.

For these reasons, the validity of intra-EU BIT is a highly controversial topic. The different views expressed in this regard will be described in the following paragraphs, from the point

³⁴⁷ Such relationship is described in detail by Bermann, G. A. (2012), at 397.

of view of both public international law and EU law. Particular attention will be paid to the investment arbitration and national case-law which has begun to develop on the issue.³⁴⁸

3.2.3.2. Intra-EU BITs from the Point of View of Public International Law

BITs and, more in general, IIAs are instruments of public international law. As such, their validity, termination and suspension must be evaluated from the point of view of public international law, with specific regard to the Vienna Convention on the Law of Treaties (VCLT).

Pursuant to Article 59 VCLT, a treaty must be considered as terminated if all the parties to it conclude a later treaty, relating to the same subject matter and incompatible with the earlier one, so that the two treaties cannot be applied at the same time. In other words, under Article 59 VCLT, a later treaty supersedes an earlier one, where their provisions cannot be applied together: under such circumstances, it must be concluded that parties intended to replace the earlier treaty. Article 30 VCLT contains an analogous rule, which though only applies to specific, incompatible provisions of the earlier treaty, rather than the treaty as a whole.

Given that BITs and EU law can contain different and incompatible standards of protection, it could be argued that intra-EU BITs must now be considered terminated, as they have been superseded by EU law after the accession of the third States to the Union. The argument has been relied upon by the Czech³⁴⁹ and Slovak³⁵⁰ Republics in recent arbitration cases, in the attempt to demonstrate that the relevant BITs no longer had binding effects. In order to resolve this problem, it is necessary to determine whether EU law can be considered public international law (thus determining the applicability of the VCLT) and whether the criteria set forth in Articles 30 and 59 VCLT are met.

The legal status of EU law is a complex matter. On the one hand, the Union is based on its founding treaties, which clearly are instruments of public international law. On the other hand, however, the Union has also evolved into an autonomous legal order, which is fully integrated into the legal systems of the Member States. The latter interpretation would be fully in line with the case-law of the Court of Justice of the European Union;³⁵¹ however, since arbitral tribunals are international adjudicators applying an investment treaty, they are in principle free to reach a different conclusion in this regard. In *AES v. Hungary*,³⁵² the arbitral tribunal described the “dual nature” of EU law, which is “an international law regime”, but, “once introduced in the national legal orders”, becomes “part of these legal orders”. On this occasion, the tribunal concluded that the domestic nature of EU law was prevailing; in *Electrabel v. Hungary*,³⁵³ on the contrary, the tribunal stated that EU law can be seen as international law, as a distinct European legal order, or as part of the domestic legal system of Member States, but then concluded that, from the point of view of an international tribunal, it had to be classified first as international law. Following the *AES* line of reasoning, it could be concluded that the VCLT does not apply to cases such as those at hand, simply because EU law is not international law and cannot, therefore, supersede an earlier treaty. On the contrary, according to the *Electrabel* Decision on Jurisdiction,

³⁴⁸ The problems arising from intra-EU BITs are discussed in detail in Tietje, C. (2013) and Eilmansberger, T. (2009), at 515.

³⁴⁹ *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, UNCITRAL *ad hoc* arbitration, SCC No. 088/2004.

³⁵⁰ *Eureko B.V. v. République de Slovaquie*, Sentence *ad hoc* selon règlement CNUDCI rendue à Francfort sous l'égide de la Cour permanente d'arbitrage, CPA N° 2008-13.

³⁵¹ Case C-402/05 P and C-415/05 P. *Kadi and Al Barakaat International Foundation v. Council and Commission* [2008] ECR I-6351.

³⁵² *AES Summit Generation Limited & Another v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 Sep. 2010, para. 7.6.6.

Applicable Law and Liability, EU law is part of international law and the VCLT could thus, in principle, apply.

The qualification of EU law as international law is not, *per se*, enough ground to conclude that intra-EU BITs have been made obsolete by the signatory States' accession to the EU. As stated above, Articles 30 and 59 VCLT both apply where the two instruments of international law relate to the same subject-matter. According to the existing arbitral case law, the VCLT provisions do not apply, because the subject-matters covered by the instruments are not the same. According to the *Eastern Sugar* tribunal,³⁵⁴ whilst in principle both EU law and intra-EU BITs deal with cross-border investments between two Member States, some important differences are to be found. First of all, BITs afford foreign investors specific standards of treatment (such as fair and equitable treatment) once the investment has been made. EU law, on the other hand, typically regulates the pre-establishment phase, aiming at removing market barriers and enhancing direct investments between Member States. Moreover, a typical feature of BITs is the arbitration clause, pursuant to which a foreign investor can convene the host State before an international tribunal, instead of national Courts, in case the host State is in breach of its obligations under the investment agreement. EU law, on the contrary, does not provide for ISDS mechanisms, leaving the investors no choice but to resort to the competent national Court. For these reasons, the tribunal in *Eastern Sugar* concluded that, although EU law is international law, the host State's accession to the EU is not enough ground to conclude that intra-EU BITs are terminated under the VCLT.

Similarly, in *Eureko v. Slovak Republic*,³⁵⁵ the tribunal held that Articles 30 and 59 VCLT did not apply, because the subject-matters were not the same. In particular, the tribunal stressed the differences in substantive protections between EU law and the BIT, as well as the investor's "right to initiate UNCITRAL arbitration proceedings against a State party", which cannot be found in EU law. One additional reason the tribunal relied upon to conclude that the BIT was not terminated is to be found in Article 65 VCLT. Article 65 sets forth a procedure to be followed when a party to a treaty invokes its termination: pursuant to this provision, the invalidity or termination of a treaty must be notified to the other parties. Therefore, according to the *Eureko* tribunal, even if the subject-matters covered by the two instruments were the same, the host State's accession to the EU would not by itself produce the effect of terminating the BIT, in the absence of a notification according to the procedure of Article 65 VCLT.

In conclusion, although the legal qualification of EU law as international law still remains a controversial matter, the existing arbitral case law constantly holds that intra-EU BITs are not terminated under Articles 30 or 59 VCLT. The inapplicability of Articles 30 and 59 VCLT, however, does not necessarily imply that intra-EU BITs are valid from every point of view. Therefore, it is now necessary to scrutinise the problem from the perspective of EU law.

3.2.3.3. Intra-EU BITs from the Point of View of EU law

As stated above, the substantive protection afforded in intra-EU BITs is at least in part overlapping with the contents of EU law: in this regard, the free movement of capital is a clear example of the possible conflict between different standards. For this reason, the

³⁵³ *Electrabel S.a. (Belgium) v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability of 30 November 2012, para. 4.20.

³⁵⁴ (n 16).

³⁵⁵ (n 17).

European Commission argues that intra-EU BITs are incompatible with EU law and that, therefore, investment treaties between two Member States should be terminated.³⁵⁶

One of the main arguments in support of the thesis of incompatibility is that investment tribunals are not bound to respect EU law, even if they decide on subject matters covered by the TFEU and regulated by EU law. As far as the problem of applicable law is concerned, it must be noted that investment arbitration case law is not consistent: on the one hand, in *AES v. Hungary*, the tribunal held that, in the context of an investment dispute, EU law can only be considered as a fact, with the *caveat* that a State cannot invoke its domestic law as an excuse for alleged breaches of its international obligations. On the other hand, in *Electrabel v. Hungary* the tribunal held that EU law binds arbitrators in international investment proceedings, because of its international legal character. In *Eureko B.V. v. Slovak Republic*, the tribunal held that EU law can be part of the applicable law in an international investment dispute, inasmuch as the relevant BIT provides for the application of the law in force in the host State, or as the arbitration is seated in a Member State. Therefore, according to *Eureko*, EU law can be applicable not because it is part of public international law, but because it is part of the legal system of the host State, which can be relevant in two cases:

1. if the BIT states that the tribunal must decide also on the basis of the law in force in the contracting State involved in the proceedings;
2. if EU law is part of the *lex loci arbitri*, given that the arbitration is seated in a Member State.

In conclusion, in light of the current uncertainty as to the applicability of EU law in an international arbitration, problems of compatibility with intra-EU BITs may arise.³⁵⁷

Assuming that EU law was to be considered applicable by an international tribunal, further problem of compatibility arise as to the modalities of such an application. Under Article 267 TFEU, the CJEU ensures a consistent application of EU law, assisting Member States' Courts in their duty of interpretation, through the system of preliminary rulings. As made clear by the CJEU itself in *Nordsee*,³⁵⁸ arbitral tribunals cannot be considered tribunals of a Member State and, therefore, cannot make a request for a preliminary ruling before the Court of Justice. For this reason it could be argued that, even assuming that investment tribunals have the duty to apply EU law, intra-EU BITs are incompatible with it, because they provide for a dispute settlement mechanism which runs contrary to Article 267 TFEU. In other words, within the European legal order, consistency in the interpretation and application of EU law is ensured through Member States Courts and their interaction with the Court of Justice. The CJEU has expressly relied on this argument in Opinion 1/09, concerning the

³⁵⁶ The position of the Commission regarding intra-EU BITs is referred to in *Eastern Sugar* (n 16), Partial Award, 27 March 2007, 26: "in order to avoid any legal problem with regard to an arbitration procedure, existing BITs between Member States should (...) be terminated".

³⁵⁷ In principle, when Member States take actions which are in conflict with their obligations under EU law, they can be subject to infringement proceedings, as they are in breach of the duty of sincere cooperation enshrined in Article 4(3) TEU. However, in the context of investment arbitration, this case of reasoning cannot apply, since the ISDS proceedings are commenced by a European investor, i.e. a private party, and not by a Member State. Where the intra-EU BITs provide for ISDS, the contracting Member States can no longer prevent their nationals from bringing cases against the host Member State. The possibility for an investor to bring a claim without any involvement or support from its home State is commonly regarded as a distinctive feature and a key achievement of investment arbitration.

³⁵⁸ Case 102/81 *Nordsee* [1982] ECR 1095.

creation of a European and Community Patent Court.³⁵⁹ In this context, the CJEU stated that the creation of such a Court would be incompatible with EU law, since it would deprive Member States of the possibility to interpret and apply EU law and request preliminary references where needed. Therefore, one could argue that intra-EU investment tribunals are, similarly, incompatible with EU law, inasmuch as they apply EU law outside of the European system of Courts. A legal basis for such an argument could be found in Article 344 TFEU, according to which Member States undertake not to submit any dispute as to the interpretation or application of the Treaties to any method of settlement other than those provided for therein. According to this line of reasoning, allowing for investment arbitration between two Member States would be tantamount to investing the private adjudicators with the power to interpret and apply EU Treaties; in light of this, the international agreements would run contrary to Article 344 TFEU.

The aforementioned arguments have been put forward by the Slovak Republic in the challenge of the *Eureko* award before the Higher Regional Court (*Oberlandesgericht*) of Frankfurt.³⁶⁰ In the challenge, Slovakia argued that the arbitral tribunal lacked jurisdiction, in light of the alleged incompatibility between the BIT and EU law; however, the arguments were rejected by the Court in its decision of 10 May 2012.³⁶¹ The Frankfurt Court held that the Dutch-Slovak BIT contains a valid arbitration clause under German law (§ 1029 ZPO) and that said clause does not violate Article 344 TFEU. In this regard, the Court stated that Article 344 only applies to disputes between two Member States, whilst, in the present case, only one of the parties to the arbitration was a EU State, whilst the other one was a private investor.³⁶² Interestingly enough, the Court held that no preliminary ruling concerning the scope of application of Article 344 TFEU was needed.³⁶³ The CJEU case-law, however, shows no clear indication as to the applicability of Article 344 to investment arbitration: whilst the Article clearly applies to inter-State disputes, as confirmed in the *Mox Plant* case,³⁶⁴ and does not apply to disputes between individuals, as the aforementioned Opinion 1/09 states, there is no precedent expressly concerning disputes between an individual and a Member State.

Moreover, the Higher Court held that, although the CJEU provides guidance in the interpretation of EU law, it is not mandatory to refer all issues of interpretation of EU law to it. In this regard, the Court relied on the authority of *Eco Swiss*³⁶⁵ to conclude that the arbitral tribunal has the authority to apply EU law autonomously. In case the award misapplies EU law and said misapplication amounts to a violation of EU public policy, a revision of the award will be possible at the enforcement stage. Moreover, the Court stated that the impossibility to request a preliminary ruling could be balanced by State Courts of the seat, which could resort to the CJEU on behalf of the arbitral tribunal, in their supporting role of *juge d'appui*.³⁶⁶

³⁵⁹ The contents of Opinion 1/09 in relation to the possibility for arbitral tribunals to request preliminary rulings are analysed in detail in Stephan W. Schill, 'Luxembourg Limits: Conditions for Investor-State Dispute Settlement Under Future EU Investment Agreements' (2013) 10(2) TDM.

³⁶⁰ The Frankfurt Court was competent to hear the case, since Frankfurt was the seat of arbitration.

³⁶¹ Gaffney, J. P. and Akçay, Z. (2014); Schäfer, J. K. and Gaffney, J. P. (2013), at 68.

³⁶² Keller, M. and Miron, S. (2013).

³⁶³ The contents of the decision relating to the problem of preliminary rulings are analysed by Konstanze Von Papp, 'Clash of "Autonomous Legal Orders": Can EU Member State Courts Bridge the Jurisdictional Divide Between Investment Tribunals and the ECJ? A Plea for Direct Referral from Investment Tribunals to the ECJ' (2013) 50 Common Market L R 1039.

³⁶⁴ C-459/03 *Mox Plant* [2006] ECR I-4635, paras. 80-139.

³⁶⁵ C-127/97 *Eco Swiss* [1999] ECR I-3055.

³⁶⁶ The mechanisms through which a *juge d'appui* can forward a request for preliminary ruling to the CJEU obviously vary, depending on the applicable procedural law of the State where the arbitration is seated. Therefore, the availability of such a solution widely depends on the contents of the State's *lex arbitri*.

In conclusion, the Higher Court of Frankfurt has rejected the argument that intra-EU BITs are no longer valid, because of their incompatibility with EU law. However, it would be wrong to draw too general conclusions from such a decision. In fact, it needs to be considered that one of the main arguments of the Court was the possible involvement of Member State Courts, which could apply for a preliminary ruling on behalf of the tribunal during the arbitration proceedings, or deny enforcement of the award for reasons of EU public policy. However, whilst *Eureko* was an UNCITRAL *ad hoc* arbitration, the legal landscape changes significantly in ICSID proceedings. In particular, under the ICSID Convention, National Courts generally do not have the possibility to be involved in the proceedings, either as supporting judges, in setting aside proceedings or during the enforcement stage. Given the free-standing, autonomous nature of ICSID arbitration, in this context the arguments made by the Higher Court of Frankfurt in *Eureko* might not apply. In conclusion, therefore, the problem of the validity of intra-EU BITs still remains highly controversial.³⁶⁷

3.2.3.4. Intra-EU Awards *vis-à-vis* Article 107 TFEU

Another problem arising from intra-EU BITs is the compliance with arbitral awards imposing the payment of sums of money. Under Article 107 TFEU, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, inasmuch as it affects trade between Member States, incompatible with the internal market. In light of this provision, it could be argued that the payment of sums by a Member State in favour of a European investor, in compliance with an arbitral award, is tantamount to a violation of the prohibition against State aid. This argument was relied upon by Romania and by the EU Commission, acting as *amicus curiae*, in the ICSID case *Micula*.³⁶⁸ According to this view, the impossibility of complying with the arbitral award without violating Article 107 TFEU would be an additional demonstration of the incompatibility of intra-EU BITs with EU law.

According to a different view,³⁶⁹ the problem of compatibility between compliance with investment awards and Article 107 TFEU cannot be resolved in general terms, but must be analysed in light of a fundamental distinction. In most cases, the violation of the BIT which led to the obligation to pay the sums is not constituted by a removal of illegal State aid, but by any other measure adopted by the host State and resulting in a breach of the obligations enshrined in the investment agreement. In these cases, the award simply imposes on the State a duty to compensate the investor: the State paying the sums, therefore, is merely complying with its international obligation. In this situation, the payment cannot constitute a voluntary grant of State aid and cannot, therefore, violate Article 107 TFEU.

On the contrary, there are situations where the host State first granted illegal aid and then revoked the measure, because of its conflict with Article 107 TFEU. If an arbitral tribunal finds that the removal of State aid constitutes a breach of the BIT, in this case complying with the award would undoubtedly result in re-granting the State aid and, therefore, in a violation of the obligations of the Member State under EU law. Therefore, in order to respect Article 107, the Member State would have in principle to deny recognition and enforcement of the arbitral award. However, the possibility to do so depends on the regime under which the arbitral decision circulates. If the arbitration was *ad hoc*, or administered

³⁶⁷ Böhm, E. and Motaabbed, M-C. (2014), at 386.

³⁶⁸ Ioan Micula, Viorel Micula, S.c. European Food s.a, s.c. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania, ICSID Case No. ARB/05/20, Final Award, 11 December 2013.

³⁶⁹ Tietje, C. and Wackernagel, C.(2014).

by any institution different from ICSID, the award circulates under the 1958 New York Convention: in this case, Member State courts could deny recognition and enforcement under Article V(2)(b), on grounds of public policy, as an award imposing the grant of illegal State aid is obviously in conflict with the basic principles of the EU legal order. On the other hand, the ICSID Convention imposes on Member States an obligation to comply with awards without any kind of assessment as to their compatibility with the recognising forum's public policy. As a result, in this case the award would give rise to a conflict of international obligations and the Member State would have no possibility to comply with both at the same time.

Some recent cases concerning the photovoltaic energy sector raise doubts as to whether payment of compensation to an investor would amount to re-granting of State aid illegal under EU law, or more simply to complying with an international obligation enshrined in an IAA. In July 2014, the European Commission sought leave to file briefs in six UNCITRAL arbitrations brought against the Czech Republic.³⁷⁰ The claims are based on the abolition of a generous tariff-scheme for solar energy, first implemented by the Czech Republic in 2005 and then replaced by a different, less investor-friendly scheme in 2010. While the new regime has been expressly approved by the Commission, it is unclear whether the old scheme constituted illegal State aid under Article 107. The choice of the Commission to seek leave to participate in the proceedings against the Czech Republic seems to suggest that, from the point of view of EU law, the abolition of the 2005 tariff scheme constituted the removal of illegal State aid and, therefore, an award imposing the payment of compensation would run contrary to EU public policy. This recent development is particularly relevant as the Czech Republic is not the only Member State to be facing investment arbitration claims arising out of renewable energy schemes.³⁷¹

3.2.4. Pre-Lisbon IIAs

Even before FDI became part of the CCP, the EU had concluded investment treaties with third States.³⁷² Although a brief overview of these IIAs is important in order to complete the analysis of the sources of international investment law within the EU, it must be noted that their content is significantly less broad than the one of existing BITs concluded by Member States. For example the Economic Partnership Agreement, concluded in 2008 between the European Community (with its Member States) and the CARIFORUM³⁷³ States, mainly focuses on pre-establishment rights (namely market access through commercial presence, thus excluding portfolio investments).³⁷⁴ On the contrary, these agreements do not encompass the post-establishment standards of protection that are commonly included in BITs: from this point of view, they aim at complementing the provisions of Member States' investment agreements, rather than substituting them, in accordance with the pre-Lisbon allocation of competences. The progressive development of the Union's competence in the field of foreign investment, made evident in the Agreement on Trade-Related

³⁷⁰ *Antaris and other v. Czech Republic*; *Natland Investment Group and others v. Czech Republic*; *I.C.W. Europe Investments Ltd v. Czech Republic*; *Voltaic Network GmbH v. Czech Republic*, *Photovoltaik Knopf Betriebs-GmbH v. Czech Republic*; *WA Investments-Europa Nova Limited v. Czech Republic*. See IAREporter, 'Brussels' Latest Intervention Casts Shadow Over Investment Treaty Arbitrations Brought by Jilted Solar Energy Investors' < http://www.iareporter.com/articles/20140908_3 > (accessed 9 September 2014).

³⁷¹ See e.g. *RENERGY S.à.r.l. v. Spain*, ICSID Case No. ABR/14/18; *CSP Equity Investment S.à.r.l. v. Spain* (SCC arbitration); *Isolux Infrastructure Netherlands B.V. v. Spain* (SCC arbitration); *Charanne (the Netherlands) and Construction Investments (Luxembourg) v. Spain* (SCC arbitration).

³⁷² Dimopoulos, A. (2011).

³⁷³ CARIFORUM is a regional organisation of fifteen independent countries in the Caribbean region (Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, the Dominican Republic, Grenada, Guyana, Haiti, Jamaica, Saint Lucia, Saint Vincent and the Grenadines, Saint Christopher and Nevis, Surinam, and Trinidad and Tobago).

³⁷⁴ Portfolio investments are investments that entail a flow of capital towards the host State, but do not imply any control over assets located therein. A typical example in this regard is an investment in securities.

Investment Measures (TRIMs) and the General Agreement on Trade in Services (GATS),³⁷⁵ has culminated in the shift of competences enshrined in Article 207 TFEU. As for the future, therefore, a new agenda of comprehensive and far-reaching investment agreements is coming to light.³⁷⁶ The future challenges related to this evolution, with specific regard to investment arbitration, will be addressed in Chapter 6.

3.3. Interaction Between Investment Law and European Union Law

3.3.1. Introduction

3.3.1.1. Standards of Protection in International Investment Law and EU Law

In order to understand the impact of investment arbitration on the European Union and its Member States, it is necessary to analyse the interaction between international investment law and EU law. Investment arbitration tribunals adjudicate disputes between investors and host States by applying a particular investment treaty, whose contents may be different from those of EU law. Therefore, before turning to the procedural aspects of investment arbitration, it is necessary to take into account the substantive standards of protection enshrined in international investment law and compare them with EU law.

The analysis carried out in Chapter 4 has shown that the subject matters covered by international investment law are, at least partially, overlapping with the ones falling within the scope of EU law. This is not surprising, if one considers that one of the purposes of EU law, as clarified by the Court of Justice since *Van Gend & Loos*,³⁷⁷ is to provide investors with legal protections, in order to entice cross-border transactions and, ultimately, to promote the economies of the Member States and guarantee an open access to European markets. In this regard, a distinctive characteristic of EU law is to afford citizens of Member States a pre-establishment protective regime, in accordance with the basic freedoms system. Although the basic rationale of EU law is from this point of view analogous to the underlying logic of investment agreements, it is important to underline from the outset that the freedoms provided for in EU law are not absolute but can, under certain circumstances, be restricted.³⁷⁸ Therefore, even if the contents of the two legal systems are in some respects similar, the interaction between them can, in some cases, be problematic. This Chapter analyses the ways in which the standards of protection included in international investment law and EU law can be different, and it identifies the consequences of this divergence.

3.3.1.2. Difference in Standards and Protection of Investors

The Chapter will first of all analyse the possible overlaps and conflicts between international investment law and EU law; in this context, particular attention will be paid to the problem of the different regime of movements of capital under EU law and the existing European BITs. Other standards of protection common to investment agreements will also be described and compared to the contents of EU law, such as fair and equitable treatment, full protection and security and protection against expropriation. It will be shown how the contents of EU law afford investors certain standards of treatment, such as the prohibition

³⁷⁵ The TRIMs and GATS agreements were concluded in the context of the WTO regime, of which the EU and the Member States are all parties.

³⁷⁶ See See Ripinsky, S. and Rosert, D. (2013) for an analysis of the contents of existing European IIAs and for proposals on future agreements, aiming an ensuring sustainable development.

³⁷⁷ Case 26/62 *Van Gend & Loos* [1963] 1.

³⁷⁸ The Court of Justice has clarified this, *inter alia*, in Case 120/78 *Cassis de Dijon* [1979] ECR 649 and joined Cases C-267/91 and C-268/91 *Criminal proceedings against Bernard Keck and Daniel Mithouard* [1991] ECR I-6097.

of discrimination or the freedom of establishment, whose scope of application is not exactly overlapping with standard BIT provisions, despite certain similarities and possible interferences.

3.3.1.3. Member States between International Obligations and Freedom to Regulate According to EU Law

EU Member States are bound by the international obligations arising from the investment agreements they have concluded with third States. In light of the problematic interactions between IIAs and EU law, the problem of the impact of international obligations on the regulatory powers of Member States will also be addressed in this Chapter. The multi-level legal system of the EU law places Member States in a peculiar position, since on the one hand they must comply with their international obligations, but on the other hand they cannot disregard their duty to regulate in accordance with the principles and objectives set forth by EU law. Therefore, this Chapter will also present possible solutions to the problem of Member States' freedom, aimed at preserving policy space and ensuring the possibility of public intervention.

3.3.2. Comparative Analysis of Standards of Protection

3.3.2.1. Free Transfer of Capital

The provisions concerning the free transfer of capital are probably the most evident case of interaction and possible conflict between international investment law and EU law.³⁷⁹ As already mentioned (see *supra*, 4.2.2.), in the 2004 infringement proceedings against Austria, Sweden and Finland, the Court of Justice found that the three Member States had infringed their obligations under EU law, because of the maintenance in force of BITs providing for unrestricted movement of capital, disregarding the limitations set forth in EU law. In order to understand how the contents of the protections can be incompatible, it is necessary to describe the scope of application of the freedom of transfer under both legal regimes, and the conditions for the aforementioned limitations contained in EU law.

Pursuant to Article 63 TFEU, all restrictions to the movement of capital between Member States and between Member States and third countries are prohibited. The scope of application of this provision is, apparently, very broad both from the objective and subjective point of view, as the prohibition applies to "all restrictions", indifferently between Member States and towards third countries. However, the Treaty also imposes some significant limitations on the free movement enshrined in Article 63: pursuant to Article 64(2), whilst endeavouring to achieve the objective of free movement of capital between Member States and third countries to the greatest extent possible, the Parliament and the Council maintain the power to adopt measures concerning this topic. The broad wording of the provision enables the EU to enact a wide range of different measures, including, where necessary, the possibility to impose limitations on the freedom of movement. In particular, under Article 64(3), the Council retains the power to adopt (unanimously, and after consulting the European Parliament, through a special procedure) "measures which constitute a step backwards in Union law as regards the liberalisation of the movement of capital to or from third countries". As for Member States, although they cannot adopt measures constituting a disguised restriction on the free movement of capital, they have the power, under Article 65(1)(b), to take measures which are justified on grounds of public policy or public security. Moreover, restrictive measures are in principle possible for economic and monetary reasons: under Article 66 TFEU the Council can, in exceptional

³⁷⁹ The interplay between EU law and international investment law in this field is described in detail by Strik, P. (2014) at 30.

circumstances where the free movement may cause serious difficulties for the operation of the economic and monetary union, take safeguard measures with regard to third countries, for a period not exceeding six months. In light of the above legal framework, it can be concluded that the free movement of capital under EU law is not an absolute protection, but rather a general goal of the Treaties, which must be pursued but which may be subjected to several types of limitations, both on the initiative of Member States and EU organs. The underlying rationale of such limitations is the need to balance the basic freedom with other fundamental values within the EU legal order, such as public policy, public security or the correct operation of the Union from an economic and monetary point of view.

International investment law, on the contrary, generally affords the investors an unlimited right to the free transfer of capital; the reason for such a broad protection is that, from the perspective of an IIA, differently from EU law, the goal of ensuring the free circulation of funds does not need to be balanced with other competing exigencies. In other words, under international investment law, free movement provisions simply aim at creating a friendly environment for foreign investments: once the investor makes a profit, it will generally be possible to repatriate it in the home State without particular restrictions. From this perspective, the risk of a clash of standards between IIAs and EU law is evident. However, some corrective solutions can be found in the practice of investment treaties.

Whilst almost all investment treaties provide for a right of the investor to make transfers, some agreements also include exceptions, in order to balance the promotion of FDI with the need to retain a certain degree of control over monetary issues and, more generally, to ensure an effective governance. For instance, Article 17 of the Korea-Japan BIT provides that contracting States can impose limitations on the free movement of capital, "in the event of serious balance-of-payments and external financial difficulties or threat thereof", or "in cases where, in exceptional circumstances, movements of capital cause or threaten to cause serious difficulties for macroeconomic management, in particular, monetary and exchange rate policies". Another example of limitation can be found in Article 7 of the US-Uruguay BIT, which allows limitations for reasons of creditor protection, criminal prosecution, law enforcement and security. Interestingly enough, these limits are substantially analogous to the conditions under which the free movement of capital can be restricted under EU law. Therefore, it can be concluded that the contents of the two legal regime can be harmonised, through the inclusion of accurate limits to the investor's right to a free transfer of capital in future European IIAs.

It could be argued that the inclusion of limitations could be detrimental for European investors abroad, as it would decrease the level of protection currently available. However, as analysed in detail below (5.3.1.), it must be taken into account that the current evolution of global economy makes it more and more difficult to determine the "capital-importing" or "capital-exporting" nature of a State on a permanent basis. On the contrary, as the experience of China clearly demonstrates, emerging and developing Countries are currently increasing their role as outward-investing actors of international economy. Therefore, whilst it is essential to maintain adequate standards of protection, it will also be fundamental to take into account these dynamics when drafting future IIAs and include limited exceptions in the regime of monetary transfers.

3.3.2.2. Fair and Equitable Treatment

As the provisions of investment treaties are usually broad, they tend to produce a twofold result: on the one hand, they afford investors a far-reaching system of protection, but on the other hand they entail a significant discretionary power of interpretation and a

subsequent risk of inconsistencies.³⁸⁰ A typical example in this regard is constituted by treaty rules providing for a “fair and equitable treatment” (FET) of the investment. Although the presence of FET provisions in IIAs is almost constant, international instruments do not generally give a definition of what constitutes (or does not constitute) a fair and equitable treatment, but rather leave it to investment treaty tribunals to define the exact contours of such a wide and elastic concept.³⁸¹ There is no clear view as to the role of FET, which according to one line of reasoning simply translates the international minimum standard enshrined in customary international law,³⁸² whilst pursuant to a different view constitutes a different and more complex standard of protection.³⁸³ Whilst it is not possible to analyse the contents of FET in detail here,³⁸⁴ it must be noted that this standard is often invoked by investors, when the host State has allegedly acted arbitrarily or in bad faith, has frustrated the investor’s expectations, has lacked transparency or has denied access to justice.³⁸⁵ As far as a comparison with EU law is concerned, it is easy to notice how such topics potentially involve many fundamental rights which form part of the European legal order. However, a difference must be underlined from the outset: whilst international investment law includes all of the aforementioned situations under the general clause of FET, which constitutes therefore the core standard of investment protection, it is not as easy to find a unifying legal ground for similar concepts under EU law. Nevertheless, it has been argued that the contents of FET overlap in substance with EU law and, in particular, with the prohibition of discrimination under Article 18 TFEU (former Article 12 EC Treaty).

In the *Eureko* case, the Slovak Republic argued that the Slovak-Dutch BIT was terminated, because of the host State’s accession to the EU. In order to demonstrate the applicability of Article 59 VCLT, the respondent State argued that the protection afforded by the BIT provision on fair and equitable treatment was entirely covered by the prohibition against discrimination under EU law. The arbitral tribunal dismissed this argument, holding that the contents of FET are wider than the scope of application of EU law principles of non-discrimination. The award presents an interesting example, which contributes to demonstrate how the two legal systems are not, from this point of view, overlapping. If the host State imposed a flat-rate corporation tax, this could constitute a violation of FET, even though it would not result in a violation of the EU prohibition against discrimination. In other words, a treatment could be considered unfair and inequitable even if it was imposed on everybody, without discriminations based on nationality or other criteria. Furthermore, it could be argued that, in some cases, a treatment could be unfair and inequitable exactly *because* it has been imposed on everyone, in cases where a distinction would have been necessary. In light of this, a first conclusion can be reached: EU law does not contain any standard of protection that, in its broadness, could be equated to the concept of FET under international investment law.

Hence, it is necessary to assess whether international investment law is, in this regard, incompatible with EU law. The fact that the contents of EU law and IIAs are not overlapping so far as FET is concerned does not, by itself, amount to an incompatibility between the two legal orders. In the aforementioned example, the treatment (a flat-rate tax) would be

³⁸⁰ Diehl, A. (2012).

³⁸¹ Kläger, R. (2011), at 21

³⁸² *Rumeli Telekom AS v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008; *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006.

³⁸³ *Enron Corp. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007; *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007. A similar conclusion is reached by Francis Mann, ‘British Treaties for the Promotion and Protection of Investments’ (1981) 52 British YB Int’l L 241.

³⁸⁴ For a detailed analysis of the relationship between fair and equitable treatment and the international minimum standard see Paparinskis, M. (2013).

³⁸⁵ Nadakavukaren Schefer, K. (2013) at 327.

prohibited under the applicable investment agreement, but permitted under EU law.³⁸⁶ However, the legal regime under EU law must be further clarified: there is no conflict or incompatibility in cases where the treatment is simply not prohibited under EU law. The circumstance that the European legal order contains no specific prohibition against the treatment simply means that Member States enjoy, in this regard, an area of freedom, i.e. the possibility to regulate the matter in the way they deem more appropriate. Therefore, Member States are simply free to decide whether to use the freedom arising from the lack of prohibition under EU law, or to limit that freedom by concluding an investment agreement which prohibits the treatment under the FET standard. Of course, such an agreement would result in an additional limit to the Member States' freedom to regulate, but this would not amount to a violation of EU law. On the contrary, the situation would change where EU law expressly provided that Member States have a right to impose a certain treatment, or even an obligation to do so. In this case, the possibility to impose the treatment would not derive from a simple absence of prohibition, but rather from a specific provision of European law, which granted a specific right or even imposed a duty. In this scenario, the unfairness or inequity of the treatment would amount to a conflict between EU law and international investment law, since the former would legally protect, or even coercively mandate, a behaviour which must be considered prohibited under the latter.

In conclusion, given that the FET standard can prohibit treatments which are not contrary to EU law, two different situations must be differentiated. In case EU law does not contain any applicable rule, the treatment must simply be considered as "not prohibited": as a consequence, the fact that the treatment runs contrary to FET only implies that EU law and international investment law have different scopes of application and that the parties to the applicable investment agreement have chosen to restrict the possibility of such a treatment further than under their domestic legal regime. On the contrary, in cases where EU law expressly grants Member States a right to impose a certain treatment, or even requires them to do so, there would be a clear conflict between irreconcilable legal regimes. Whilst in the first situation no particular action would be needed to ensure consistency between EU law and international investment law, in the second case the conflict could only be avoided by limiting the scope of application of FET under investment agreements. An example in this regard can be found in the 2005 US-Uruguay BIT, which provides at Article 5 that each contracting party must accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security. The agreement further states that customary international law results from a general and consistent practice of State that they follow from a sense of legal obligation. However, it must be noted that FET still remains a very broad and elastic standard and that arbitral tribunals tend to base its application on a case-by-case analysis, taking into account the wording of the applicable FET provision, the factual circumstances and the behaviour of the parties.

3.3.2.3. Protection and Security

The vast majority of investment treaties afford investors a certain standard of protection and security. Although the wording can vary ("full protection and security", "protection and security", "complete protection and security" and "full legal protection and security" are commonly found in IIAs), the common aim of these provisions is to guarantee that investors and investments will not be harmed or affected negatively. This very broad standard requires the host State to create a safe environment for investors, diligently undertaking all measures that could contribute to avoid damage. Although the provision historically stems from the need to protect people and property against physical harm

³⁸⁶ From the point of view of the prohibition against discrimination.

(such as the one resulting from revolutionary assaults), arbitral case law has progressively extended the scope of application of this standard, encompassing under certain conditions legal security as well.³⁸⁷ However, the core of the protection and security standard remains the due diligence to undertake all reasonable measures, in order to avoid damages to foreign investors.³⁸⁸

The basic freedoms enshrined in the EU Treaties partially deal with the same subject matter as full protection and security provisions under international investment law. In particular, pursuant to Article 49 TFEU, restrictions on the freedom of establishment are prohibited and, according to Article 50, the Parliament, the Council and the Commission must carry out a wide range of duties, in order to implement and protect the establishment in another Member State. However, despite a number of significant similarities, the freedom of establishment cannot be considered overlapping with the protection and security standard, for a number of reasons. First of all, the freedom of establishment is only applicable between two Member States and mainly aims at creating an open-access market, rather than granting an unrestricted protection against all injurious events. Furthermore, it must be underlined that EU provisions on freedom of establishment are only applicable in the pre-establishment phase, as they protect the possibility for European citizens to operate in a different Member State, but do not affect the events following the establishment. On the contrary, IIAs generally afford a general and unrestricted protection, which extends both to the events preceding and following the establishment of the investor in the host State.

In conclusion, whilst EU law creates a strong regime of intra-European protection as far as the pre-establishment phase is concerned, investment treaties generally complement said standard with further provisions on protection and security, whose scope of application extends to post-establishment events as well.

3.3.2.4. Protection Against Expropriation

IIAs commonly contain a protection against expropriation of the investment. These provisions play a key role in the enticement of FDI, as guarantees against the risk of seizure of assets are commonly regarded as a fundamental requisite for cross-border investment.³⁸⁹ Under international investment law, protection against expropriation generally covers both direct and indirect expropriation. Whilst a direct expropriation can be broadly defined as the takeover of an investment by the host State, indirect expropriation is a creeping kind of seizure, where the host State undertakes measures which decrease the economic benefit of the investment, without formally taking away the title of property.³⁹⁰ Therefore, investment treaties adopt a pragmatic approach, protecting investors against *de facto* expropriations notwithstanding their legal qualification under the *lex loci*.³⁹¹ Indirect expropriation may be enacted through a wide range of techniques, such as governmental interference with the performance of a contract or with the control of the investment, revocation of administrative permits and licences, or an unforeseeable and unreasonable increase of fiscal pressure. In all of these cases, arbitral tribunals must determine whether a certain treatment by the host State is part of its legitimate regulatory discretion, or is tantamount to a dispossession of the investment.

In the context of EU law, the problem of expropriation is made more complex by the interplay between different competences of the Union and Member States. On the one

³⁸⁷ *Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal SA v. The Argentine Republic*, ICSID Case No. ARB/03/19, and *AWG Group v. The Argentine Republic*, Decision on Liability, 30 July 2010. On the extensive interpretation of protection and security see also Sornarajah (2012), at 359.

³⁸⁸ *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award 8 December 2000.

³⁸⁹ Salacuse, J. W. (2010) at 285.

³⁹⁰ Ratner, S. R. (2008), at 475.

³⁹¹ Rubins N. and Kinsella, N. S. (2005) at 183.

hand, pursuant to Article 17 of the EU Charter of Fundamental Rights, nobody can be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by the law, subject to fair compensation being paid in good time for their loss. However, the regime of *in rem* rights is not entirely regulated by EU law, but falls within the competence of Member States, which can therefore modulate the treatment of proprietary rights autonomously, in accordance with the basic principles set forth in EU law and with the limitations foreseen in Article 1, Protocol 1 to the ECHR, to which all EU Member States are parties. In light of this, it must be concluded that the contents of EU law and international investment law are different, from many points of view. First of all, the protection against expropriation enshrined in IIAs extends to a wide range of situations, which fall under the broad and elastic concepts of “investment” or “assets” related to said investment. In contrast, the provisions of EU law only apply to property and possession and, therefore, the scope of application is much narrower. Moreover, Article 17 of the EU Charter only refers to situations where a governmental act deprives someone of *in rem* rights and, therefore, does not cover situations of indirect expropriation, where the *de facto* dispossession does not reflect a formal change in the legal title. In conclusion, the contents of EU law are partially analogous, but do not completely overlap with the protections commonly afforded by investment treaties.

3.3.3. Capacity to Regulate: EU Law *vis à vis* International Obligations

3.3.3.1. The Evolving Face of the Global Market

The analysis conducted so far has shown how the contents of EU law and international investment law are not the same, although the scopes of application of the two legal systems are partially interrelated. As a conclusion, it has been underlined how Member States’ international obligations under the existing BITs can, to some extent, be in conflict with the duties imposed by EU law. Therefore a careful drafting of future European agreements, concluded under Article 207 TFEU and substituting the current network of Member States’ bilateral treaties, will be essential in order to ensure that international obligations arising from investment law do not clash with the European legal order and with the capacity to regulate within this context, in accordance with the multi-level system of law designed in the EU Treaties. Because of this, it is necessary to investigate how an adequate policy space can be maintained, without frustrating the expectations of foreign investors and, as a consequence, without decreasing the FDI flow. In this regard, the European Parliament has clearly stated that future IIAs must leave room for public intervention, in order to ensure the possibility to regulate in the public and democratic interest.³⁹²

The exact contours of the future European policy in the field of FDI still need to emerge in their entirety. However, since its Communication of 7 July 2010,³⁹³ the Commission has stressed the importance of ensuring a high level of protection for European investors abroad. According to this view, maintaining the current “gold standard” of protection, guaranteed under a wide number of Member States’ BITs, should be considered as a priority of the CCP. However, in order to encompass the complexity of the problem, it is necessary to balance different needs, also taking into account the evolving face of the global market.

The underlying logic of the vision pursuant to which future European IIAs should afford a high degree of protection and, therefore, establish continuity with Member States’ BITs, is

³⁹² Resolution of the European Parliament on the future European international investment policy, 6 April 2011, 2010/2203(INI).

³⁹³ Towards a Comprehensive European International Investment Policy, COM (2010) 343 final (7 July 2010).

that EU States are mainly exporting capital and their investors would, therefore, benefit from such a regime.³⁹⁴ On the contrary, third capital-importing States would be bound to afford an investor-friendly treatment and, potentially, face ISDS claims in case of non-compliance. However, it should be also taken into account that emerging and developing economies are progressively starting to export capital as well: the evolution of the global market makes it more and more difficult to distinguish between capital-importing and capital-exporting States clearly.³⁹⁵ As a consequence, and considering the long duration of the protections afforded by BITs, in the future the European Union and its Member States could potentially face an increase of investment claims brought against them before arbitration tribunals by investors coming from countries which were traditionally considered importers of capital. Therefore, the contents of international investment law within Europe should be partially re-thought and re-shaped.

3.3.3.2. Contents of IIAs Between Accuracy and General Clauses

The comparison between international investment law and EU law demonstrates how the contents of existing IIAs are extremely broad and vague; for this reason, it is in many cases not easy to determine whether the provisions of investment treaties deal with the same subject matters as EU law. The reason for the “open” and, to some extent, elastic wording of these treaties is to be found in the will to create a protective investment regime, which can evolve through time with the accumulation of arbitral case law. In other words, when operating their case-by-case analysis and assessing whether standards like FET or indirect expropriation are applicable, arbitral tribunals partially need to act as lawmakers.³⁹⁶ In performing this task, arbitrators refer to the precise wording of the applicable IIA, as well as on the guidance that arbitral precedent might provide. Because of this, in the context of investment arbitration, past awards generally play a more prominent role than in commercial arbitration.³⁹⁷

This regime implies that the actual contents of international investment law are not only determined by the contracting States in their activity of treaty-making, but are also influenced by the application of the agreements in investment disputes. The risk of such a mechanism, from the point of view of the capacity to regulate, lies in the possible expansion of the scope of application of the provisions of the treaties by arbitral tribunals, and in the subsequent reduction of the “policy space” of States. For this reason, it can be argued that future European IIAs should enact a partial shift in perspective: while it is fundamental to continue to provide investors with an adequate and complete system of protection, it is also very important (and will become even more so in the future) to control the area of application of investment law provisions. This balance could be found through a more detailed description of the contents of investors’ rights and host States’ obligations, which arbitral tribunals could refer to specifically when adjudicating a dispute. From this point of view, the process could be seen as a partial codification of investment law, or the clarification of specific and punctually defined rules. Of course, this process should not compromise the “general” quality of investment law provisions, which is indispensable to

³⁹⁴ Lavranos, N. (2013).

³⁹⁵ European Parliament resolution of 6 April 2011 on the future European international investment policy (2010/2203(INI)), recital F: ‘the emergence of new countries with strong investment capacity as local or global powers has changed the classic view whereby the only investors were from developed countries’.

³⁹⁶ It is important to underline that this “lawmaking” role of arbitrators is different from the one played by the judge in common law jurisdictions. Whilst common law judges apply a clearly defined rule in accordance with precedent decisions (*stare decisis*), arbitrators often need to apply general principles and clauses, such as “fair and equitable treatment”, to unprecedented cases. In addition, arbitral case-law can provide guidance, but is not binding on arbitrators, whose main duty is to find the most suitable solution for one particular case. Therefore, the creative power of arbitrators is broader than the rulemaking authority of judges, both in common and civil law jurisdictions.

³⁹⁷ Dolzer, R. and Schreuer, Ch, (2012) at 33.

implement a flexible system of protection and, to a larger extent, to create an investor-friendly environment in the host State. On the other hand, however, this evolution could help interpreters and practitioners to define the exact boundaries of international investment law and, conversely, to shape the contours of a “space of free movement”, where States maintain their ability to regulate relevant matters according to their internal democratic principles and procedures.

The task of reforming international investment law whilst maintaining its fundamental protective functionalities is, of course, very complex. In order to create a consistent and clearly-assessable legal regime, it would be necessary to overcome the current condition of fragmentation. The existence of a multitude of investment treaties, containing partially diverging provisions and having different scopes of application, makes it difficult to ascertain the contents of the applicable investment law in a specific case. In this regard, efforts towards a multilateralisation of investment agreements would have the beneficial effect to increase harmonisation and consistency.³⁹⁸ Although the current state of international relations makes the possibility of concluding multilateral agreements remote, the creation of a body of simple common guidelines and general principles could help all States involved increase the inner consistency and reliability of the regime of international investments. A similar effect could be achieved through the elaboration of model-IIAs, which States could use as a framework and starting point for all future negotiations: the standardisation of investment provisions could, to a certain extent, contribute to the establishment of legal certainty and predictability of ISDS decisions. These efforts, however, cannot entirely solve the problem of consistency: diverging interpretations of IIAs are, to a large extent, the consequence of the broad and vague nature of some of the most important and commonly invoked provisions. Therefore, as far as future European IIAs are concerned, certainty and consistency could be ensured through the adoption of a more detailed and specific language, both for substantive and procedural provisions. Problems regarding the former and their possible incompatibility with EU law have already been addressed; in light of this, a clear limitation of the scope of application of provisions such as FET or free transfer of capital would be necessary to guarantee the legal sustainability of investment agreements within the European area. As for procedural provisions concerning ISDS, the drafting of more detailed rules, providing guidance for arbitrators in the performance of their tasks, would also be beneficial in the process of reform of international investment law. From this point of view, the new role of the EU under Article 207 TFEU will be fundamental, as it opens the field for new procedural scenarios. Considering the emerging role of the Union as a main actor of future investment disputes, the problems relating to the structure of EU law and the relationship between the EU and its Member States will be analysed in detail in Chapter 6.

3.4. Investment Arbitration and the European Union

3.4.1. Introduction

3.4.1.1. The New Role of the European Union in Investment Arbitration and the Mixed Nature of Future Agreements

This Chapter analyses the interactions between the European Union and future investment arbitration proceedings, conducted under IIAs concluded in the framework of Article 207 TFEU. The relevance of the theme is crucial, as the Union is currently in the process of negotiating a number of investment agreements with third States, such as the Transatlantic

³⁹⁸ Geiger, R. (2011), at 153.

Trade and Investment Partnership (TTIP) with the United States and therefore needs to decide whether to consent to ISDS within this framework.

It is important to stress from the outset that, in this context, the role of the Union and its organs is going to be very different than the one that the EU can currently play under Member States' BITs. Whilst the EU is not a party to the existing agreements and can thus only "cooperate" to the defence of the respondent Member State, as stated in Article 13(1)(b) of Regulation no. 1219/2012, it will be a party to future investment agreements shaping the CCP. Therefore, investors will be able to bring claims directly against the EU, for alleged breaches of the obligations contained in the aforementioned agreements. The issues arising from this new perspective of involvement of the EU in ISDS proceedings will be addressed here.

Although FDI forms now part of the CCP and constitutes, therefore, an exclusive competence of the Union, this does not necessarily mean that the EU will from now on conclude IIAs by itself, without any involvement from Member States. On the contrary, although the specific content of future treaties (such as the TTIP) has not been defined yet and therefore the EU Commission has not taken an official position in this respect, it is highly likely that agreements with third States will be signed, on the European side, both by the Union and the Member States.³⁹⁹ The mixed nature of future IIAs finds several justifications: first of all, a mixed treaty is the only technique which could ensure a comprehensive, far-reaching and effective policy of foreign investments. Current BITs usually contain a wide range of protections for foreign investors, which all contribute to the creation of a friendly environment for cross-border transactions. One of the main goals of future European IIAs is to substitute the existing network of agreements concluded by Member States, without decreasing the level of protection available for European investors abroad. Therefore, according to this view, it is vital to manage the shift of competences enshrined in Article 207 TFEU effectively, without depriving investors of the standards of treatment they have had so far. In order to do so, European investment treaties will have to cover a wide range of heterogeneous fields, such as taxation (in order to ensure investors a fair tax regime) or property (the protection against expropriation plays a fundamental role in international investment law).

The mixed nature of future agreements will ensure that the scope of application of the treaty is wide enough to cover any relevant form of investment. Many BITs include a broad and open-ended definition of "investment", which embraces both direct and portfolio investments and extends protection to any kind of risk-bearing economic activity. From the point of view of EU law, though, one fundamental distinction must be drawn: whilst FDI falls under Article 207 TFEU, portfolio investments are not regulated by the same provision. Therefore, if Member States did not participate to the conclusion of future IIAs, it would be impossible for the EU to grant effective standards of protection as far as portfolio investments are concerned. Considering the importance of a consistent and complete policy of protection of foreign investments as a whole, therefore, it must be concluded that the EU will sign IIAs alongside the Member States, thus exerting both exclusive competences (in the field of FDI) and implied shared external competences (as for portfolio investments).

3.4.1.2. Involvement of the EU in Future Investment Arbitrations: the Problems of the Right Respondent and Internal Liability

Since both the EU and Member States are going to be parties to future IIAs, foreign investors could, in principle, activate the available ISDS mechanism against the Union or against the particular Member State(s) where the investment has taken place. In the field of investment disputes, the International Centre for the Settlement of Investment Disputes

³⁹⁹ Reinisch, A. (2013) at 195; Bungenberg, M. (2011) at 29.

(ICSID) Convention is of central relevance. However, the European Union could not act as a respondent in an ICSID arbitration, because it is not (and cannot be) a part to the ICSID Convention. The reason for this situation is to be found in Article 67 of the Convention, pursuant to which any new subjects accessing to the agreement must be members of the World Bank or of the Statute of the International Court of Justice. Therefore, regional associations (like the EU) cannot become part to the ICSID Convention, unless the Convention itself is amended. Considering that the Convention requires the unanimous agreement of all parties for its amendment (Article 66), the accession of the Union must be considered highly unlikely, at least in the foreseeable future. In light of this, the involvement of the EU in arbitration proceedings must mainly be imagined within an *ad hoc* environment, such as, *inter alia*, UNCITRAL arbitration.

This new scenario gives rise to two significant problems, which will be addressed in this Chapter. The first issue is the identification of the appropriate respondent in the proceedings. Although the problem is apparently strictly procedural in nature, its resolution requires an analysis of the structure of the Union and of the relationship between Member States and EU organs (namely the Commission).⁴⁰⁰ The second question to be addressed is the allocation of financial responsibility, in case an arbitral tribunal finds that the obligations contained in the agreement have been breached and, therefore, pronounces in favour of the investor. Once again, in order to answer the question, it will be necessary to analyse the division of competences between Member States and the Union under EU law.

3.4.1.3. Impact of Decisions by Investor-State Arbitration Tribunals

The research carried out in the previous Chapters has shown how EU law and international investment law can, to some extent, overlap and conflict. Therefore, it is possible that a decision made by an investor-State arbitration tribunal contradicts the obligations of a Member State under EU law.⁴⁰¹ This scenario is particularly delicate, as on the one hand non-compliance with the award would constitute a breach of the respondent Member State's obligations under public international law, but on the other hand compliance with the award would constitute a breach of EU law and give potentially rise to infringement proceedings. The problem will be discussed from both perspectives, also underlining the relevance of public policy as a possible barrier to the enforceability of the award within the EU. Furthermore, the available solutions for a coexistence of EU law and international investment law will be discussed, with a specific focus on prospective EU IIAs, such as the TTIP.

3.4.2. The Union's Direct Participation in Investment Arbitration

3.4.2.1. Inclusion of ISDS Chapters in the TTIP and Other IIAs

The entry into force of the Treaty of Lisbon inaugurates a new era of international investment law in Europe. Article 207 opens new opportunities for the Union, which could benefit greatly from the new mechanisms of CCP. In particular, the possibility of concluding a mixed agreement with the Union and its Member States is going to be particularly attractive for third States, as it will make it possible to establish a privileged investment regime with every EU State, without the need to negotiate separate instruments with each one. As a result, it will be possible for the EU to benefit from an increased bargaining power

⁴⁰⁰ Satkauskas, R. (2012).

⁴⁰¹ The analysis carried out in the previous Chapters focuses on the position of Member States, rather than the Union as a whole, because so far investment treaties have been concluded by Member States and are only directly binding on them and on the third contracting States. The remainder of Part C will scrutinise the problems arising out of investment arbitration chapters in future IIAs, concluded by the European Union.

and, subsequently, from the possibility of contributing to a re-definition of the standards of international investment law. On the other hand, however, the Union should be careful in taking into account the positions of all stakeholders involved, paying attention to issues such as the importance of democratic participation in the treaty-making process and the need to maintain the level of protection currently afforded by extra-EU BITs. Relying on past treaty practice and on the experience that Member States have accumulated over decades of international investment policy could, to a certain extent, be beneficial for the success of the CCP.

As described above (supra, 5.2.1.) in July 2010 the Commission published the Communication *Towards a Comprehensive European International Investment Policy*,⁴⁰² laying down the future guidelines of the CCP as far as international investment is concerned. In this document, the Commission stressed the importance of creating a comprehensive and consistent investment regime, affording investors high standards of protection. One of the pillars of this agenda is the effective enforceability of investment provision, through the inclusion of ISDS chapters in future IIAs. Consistently with this approach, investor-to-State arbitration clauses are included in the EU-Canada Comprehensive Economic and Trade Agreement (commonly referred to as CETA).⁴⁰³

Investment arbitration has been the subject of significant criticism in the recent past⁴⁰⁴. In particular, it has been argued that acts of a State should not be reviewed by investment treaty tribunals, which adjudicate disputes in private and do not give sufficient attention to issues such as transparency of proceedings and consistency of the outcome. In light of these positions and in order to ensure democratic participation within the process of treaty-making, the Commission has recently launched a public consultation on modalities for investment protection and ISDS in the TTIP.⁴⁰⁵ In the framework of this consultation, the Commission refers to the CETA as a possible model of ISDS to be included in the TTIP. The problems of transparency and consistency of ISDS will be analysed in detail in the following paragraphs. However, in order to understand the consequences that future IIAs will have on the Union and its Member States, it is first of all necessary to determine which subject is going to act as respondent in the arbitration proceedings conducted under said agreements.

3.4.2.2. The Union and Member States as Respondents in Arbitration Proceedings

As illustrated above, it is crucial to determine whether the Union or the host Member State must act as a respondent in investment arbitrations conducted under the future generation of European IIAs. In this regard, in summer 2012 the Commission published a draft Regulation establishing a framework for managing financial responsibility linked to ISDS

tribunals established by international agreements to which the EU is party.⁴⁰⁶ The Regulation was subsequently approved on 23 July 2014.⁴⁰⁷

⁴⁰² COM (2010) 343 final (7 July 2010).

⁴⁰³ Canada-European Union CETA (August 1, 2014 Draft), <http://www.transnational-dispute-management.com/legal-and-regulatory-detail.asp?key=13077> (accessed 2 September 2014). The negotiations for CETA are concluded, but the agreement is not yet ratified and does not, to date, bind the European Union and its Member States.

⁴⁰⁴ For an analysis of such criticism see Brower, C. N. and Blanchard, S. (2014), at 689; Stern, B. (2011), at 174; Waibel, M., Kaushal, A., Kyo-Hwa Chung, L. and Balchin, C. (2010).

⁴⁰⁵ EU Commission, 'Public consultation on modalities for investment protection and ISDS in TTIP', http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152280.pdf (accessed 2 September 2014)

⁴⁰⁶ COM (2012) 355 final (21 July 2012), http://trade.ec.europa.eu/doclib/docs/2012/june/tradoc_149567.pdf (accessed 2 September 2014). The contents of the proposal are analysed in a study commissioned by the European Parliament: Christian Dietje, Emily Sipiorski and Grit Töpfer, 'Responsibility in Investor-State Arbitration in the EU', http://www.europarl.europa.eu/RegData/etudes/etudes/etudes/join/2012/457126/EXPO-INTA_ET%282012%29457126_EN.pdf (accessed 2 September 2014).

The basic rule set forth in the Regulation is that the subject which has afforded the treatment giving rise to the investor's claim acts as the respondent. In principle, pursuant to Article 9, the Member State will usually act as the respondent. However, by way of exceptions to the general rule, the Union will act as a respondent when:

- (a) The Union would bear all or at least part of the potential financial responsibility;
- (b) The dispute also concerns treatment afforded by EU institutions, bodies, offices or agencies;
- (c) Similar treatment is being challenged in a related claim against the Union in the WTO, where a panel has been established and the claim concerns the same specific legal issue, and where it is necessary to ensure a consistent argumentation in the WTO case;
- (d) The Member State has confirmed in writing that it does not intend to act as the respondent within forty-five days.

Some parts of the Regulation raise concerns. First of all, the power to act as a respondent can arise whenever the EU may face 'financial responsibility', a broad wording which comprises joint Union-Member State responsibility. However, the Commission does not enjoy full discretion when deciding whether to act as a respondent, since the choice must be based on a full and balanced factual analysis and legal reasoning provided to the Member States. Furthermore, the Commission can decide to act as a respondent whenever similar claims are brought under the WTO. It must be noted that, differently from the original proposal of the Commission, the Union cannot decide to act as a respondent simply because similar claims are brought or might be brought in different arbitration proceedings. This exclusion is consistent with the circumstance that arbitrators are not formally bound by the *stare decisis* principle and can therefore decide not to follow arbitral precedent, even if the claims are similar or if past decisions have ruled on the same issues of law. Hence, even if the EU acted as the respondent in order to put forth certain arguments, the outcome of that particular dispute would not necessarily have an influence on the decision of other arbitral tribunals in similar cases.

The system set forth in the Regulation, according to which only one subject (the Union or the Member State) acts as a respondent, is not, *per se*, in line with the principles of international arbitration, according to which the claimant can convene before the tribunal one or more allegedly liable subjects which signed the arbitration agreement (multi-party arbitration). In general, the respondents have no right to indicate to the tribunal one subject, which will resist the claim(s) as the only defendant. The reason why the Regulation implemented this mechanism is, clearly, to avoid inconsistencies in the defensive positions of the Union and of the involved Member State. However, such a system will require an express provision in the ISDS chapters of the treaties: only in this case, the tribunal could be obliged to respect the designation of the respondent under EU law.

Irrespective of who acts as a respondent, the Commission maintains a central supervisory role over the defence of the investor claim. The Regulation provides for mandatory consultations between the Commission and the host Member State, aimed at ensuring coordination between national and European needs and defensive strategies. From this point of view, the *rationale* is analogous to the one of Article 13 of the Grandfathering Regulation, which provides for a duty of full cooperation between the Commission and the

⁴⁰⁷ Regulation (EU) No. 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party, OJ L 257, 28.08.2014.

involved Member State. However, the inclusion of such a mechanism in the context of future ISDS chapters does not come without difficulties, as most arbitration proceedings are currently conducted under a regime of privacy, which could hinder the free exchange of information between the Commission and the Member State, thus *de facto* nullifying the possibility of open consultations. Although ICSID proceedings are, to a certain extent, more open to the principle of transparency, the direct involvement of the EU in investment arbitration would currently be only possible in an *ad hoc* environment, because of the strictures of the ICSID Convention (see *supra*, 6.1.2.). Therefore, in order to ensure a lawful and open cooperation between the Commission and Member States, the problem of transparency should be taken into account in the negotiation of future IIAs, such as the TTIP. Only if future investment treaties provided for the possibility of divulgence by the Member State to the Commission of relevant information, Member States and the Commission could cooperate to the arbitral defense without infringing their international duties. In light of this problem, it is now necessary to analyse the possible solutions to the problem of transparency.

3.4.2.3. Possible Solutions to the Problem of Transparency

The problem of the privacy is particularly evident in investment arbitration, since the tribunal is asked to review certain acts of the host State, such as an administrative decision or a legislative instrument, which the investor asserts as incompatible with the applicable IIA. Considering that these acts involve the exertion of sovereign powers, the decision over issues of public interest and the allocation of taxpayers funds,⁴⁰⁸ which form part of the democratic functioning of the host State,⁴⁰⁹ it has been argued that investment arbitration proceedings should not be conducted confidentially. In the context of future European IIAs, transparency of ISDS would also play an essential role in enabling the Commission and Member States to communicate with each other.

ICSID arbitration partially acknowledges this need for transparency: in application of Article 48(4) of the ICSID arbitration rules, which provides that the Centre can publish the award with the consent of the parties, ICSID awards are often publicly available. Moreover, ICSID includes in its publications excerpts of the legal reasoning of tribunals, thus contributing to the emergence of a consistent case law in the field of investment disputes. However, since the EU could not take part in an ICSID arbitration, a different solution to the problem of transparency needs to be identified for *ad hoc* proceedings. In this regard, particular attention must be paid to the new UNCITRAL Transparency Rules for treaty-based investor-State arbitration.⁴¹⁰

The Transparency Rules, elaborated by the UNCITRAL Working Group on Arbitration after years of negotiations, entered into force on 1 April 2014 and will, therefore, apply to all investment arbitrations conducted under the UNCITRAL Arbitration Rules, based on Treaties concluded on or after the aforementioned date, unless the parties to the treaty have agreed otherwise (*opt-out* mechanism). This provision is crucial for future European investment treaties, because the Rules will apply automatically to all UNCITRAL arbitrations conducted under such agreements. As for IIAs concluded before 1 April 2014, the parties to the treaty have the possibility to agree on the application of the Rules (*opt-in* mechanism). Moreover, the Transparency Rules can operate as a stand-alone instrument and apply to proceedings conducted under sets of rules different than UNCITRAL.

⁴⁰⁸ Miles, K. (2013).

⁴⁰⁹ The complex connection between the investor and the host State is described by Salacuse, J.W. (2007) at 138.

⁴¹⁰ The CETA expressly refers to the UNCITRAL Transparency Rules at Article X.33, further extending the principle of transparency with regard *inter alia* to hearings and access to documents.

The Transparency Rules introduce innovative provisions in the fields of publication of documents, participation of third persons and non-disputing parties and publicity of hearings. Pursuant to the Rules, some basic information about the proceedings will be made public from the outset, such as the names of the disputing parties, the economic sector involved and the treaty under which the claim is being made. As far as documents are concerned, the disclosure is partially automatic: pursuant to Article 3(1), a number of documents (e.g. the notice of arbitration, the response, statements or written submissions, transcripts of hearings, orders, decision and awards) will immediately be made available by the tribunal. Moreover, under Article 3(2), expert reports and witness statements will be made available to the public, upon request by any person to the arbitral tribunal. Finally, under Article 3(3), the arbitral tribunal has a discretionary power to decide, on its own initiative or upon request from any person, and after consultation with the disputing parties, whether and how to make any additional document, such as exhibits, available. This being the general principles of document transparency, Article 7 sets forth a number of exceptions, i.e. cases where the Tribunal can refuse to make confidential and protected information available to the public. In light of this it can be concluded that, although the Transparency Rules represent a fundamental shift towards the principle of general publicity of investment arbitration, the tribunal maintains an important degree of discretion and can impede the divulgence of certain documents on a case-by-case basis. In using such a discretionary power, the tribunal should balance the public interest in transparency on the one hand, and the disputing parties' interest in a fair and efficient resolution of the dispute on the other.

As for the participation of third parties to arbitral proceedings, it must be noted that investment tribunals tend to allow a limited involvement of *amici curiae*, whose role is mainly to cooperate with the arbitrators in the finding of the relevant issues of the case. However, it has been shown (see *supra*, 4.2.7.) how the position of an *amicus curiae* is not consistent with the need of the European Commission to participate to arbitral proceedings involving a Member State, in order to support the respondent's defence. The role of *amici curiae* is mainly to assist the tribunal and to represent the general position of all interested stakeholders, rather than the defense of the respondent's position in the arbitration. From this point of view, the Transparency Rules can be extremely helpful, as they differentiate between allowing submissions from third parties, which are neither a disputing party nor a party to the applicable treaty (Article 4), and non-disputing parties, which are parties to the treaty (Article 5). Within the framework of future mixed European IIAs, therefore, the application of the Transparency Rules could allow the Commission to submit statements under Article 5, even when the Union does not directly act as a respondent.

As for the contents of the two types of submissions, third parties should provide the tribunal with relevant information, as *amici curiae*, whilst non-disputing parties should in particular assist the arbitrators on issues of treaty interpretation, as well as on other matters within the scope of the dispute. In both cases, the tribunal will evaluate whether to allow the submission, after having taken into consideration whether the third party has a significant interest in the proceedings, and the ability to assist the tribunal on fact or law finding.

The Transparency Rules affirm the principle that oral hearings are public. This provision could have a great impact on the future of investment arbitration, as it would allow a high degree of public scrutiny on the way the public interests involved in the case are balanced with the protection of foreign investors. However, the default rule of publicity meets some limitations: under Article 6(2), the arbitrators can make arrangements to hold the hearing or part of it in private, where there is a need to protect confidential information or the integrity of the arbitral process. Once again, therefore, the tribunal has the power (and the responsibility) to use its discretionary power in order to balance the general rule of publicity

with the protection of confidential information, as well as the need to ensure the correct conduct of the proceedings.

Considering that investment claims can involve issues of public interest, opening the hearings to the public could be problematic from the logistical point of view, in light of the high number of groups and individuals potentially interested in attending. In this regard, Article 3(3) provides that the tribunal has the power to make logistical arrangements to facilitate attendance, including the use of video links or other means. Moreover, the Tribunal can also decide to hold all or part of the hearings in private, where this becomes necessary for logistical reasons. The application of this last provision could be problematic, as it grants the tribunal a discretionary power to close the hearing to the public, for reasons that do not stem from the need for confidentiality, but rather derive from a simple assessment of logistical feasibility. Therefore, this rule should be interpreted restrictively: arbitrators should, in principle, conduct the hearing in public whenever possible, if no prevailing reasons of confidentiality require the opposite. IIAs can also limit this discretionary power, and provide for public hearings, unless confidentiality is needed to protect confidential information: Article X.33(5) of the CETA is a clear example in this regard.

3.4.2.4. Possible Solutions to the Problem of Consistency

As stated above, arbitral tribunals are not bound by the principle of *stare decisis*, i.e. they have no duty to decide the case on the basis of the content of past decisions on similar issues; therefore, there is a potential risk of inconsistency of arbitral awards, which might decide analogous cases differently.

The issue of consistency has been addressed in the TTIP public consultation. In that context, particular attention is paid to the circumstance that a decision by an ISDS tribunal is generally final, as the grounds for possible challenges are usually very limited. The absence of appellate mechanisms obviously contributes to the risk of inconsistencies, as there is no tool to correct divergences in the resolution of disputes. A way to resolve this problem would be to introduce an appellate mechanism in future treaties, allowing a second instance body to review the arbitral rulings.⁴¹¹ The TTIP negotiations are, in this regard, particularly ambitious, as the EU aims at establishing an appellate mechanism directly through the agreement, rather than simply envisaging the possibility to create it in the future, as is the case with CETA.⁴¹² Although it remains to be seen whether these efforts will turn into binding provisions of the treaty, the implementation of an appellate review of awards would have the effect of increasing the consistency and enhance the persuasive (if not binding) effect of arbitral precedent. On the other hand, it must be noted that the current success of arbitration also depends on the finality of decisions, which can only be reviewed in exceptional cases;⁴¹³ therefore, allowing for appeal under too general and undetermined circumstances could have the undesirable effect of discouraging the use of investment arbitration as a tool of dispute settlement. Therefore, the provisions on appellate review should be drawn carefully and aim at finding a balance between the need for consistency and the stability of arbitral decisions. In addition to that, it must be taken into consideration that inconsistencies between arbitral awards largely depend on the broad wording of the applicable standards of protection. Therefore, the problem of consistency should be addressed not only through procedural mechanisms, but also through a

⁴¹¹ Legum, B. (2008) at 231.

⁴¹² European Commission, TTIP negotiations: Modified EU draft proposals on trade in services, investment and electronic commerce, 2 July 2013, TRADE B1, B2/asc / 2557028.

⁴¹³ For an analysis on the scope of the review exercised by *ad hoc* Committees in ICSID arbitration see Gouiffes, L. (2013) at 275.

clarification of the applicable substantive rules.⁴¹⁴ In this regard, the inclusion of more detailed definitions of general standards, such as fair and equitable treatment, or the introduction of a mechanism of binding interpretation by the contracting sovereign entities, would limit the arbitrators' discretionary powers and, therefore, reduce the risk of conflicting decisions.⁴¹⁵

3.4.3. Impact of Arbitral Awards

3.4.3.1. The Problem of Internal Liability

The new generation of European IIAs is going to have an impact not only on the conduct of the proceedings and the identification of the right respondent, but also on the problem of internal liability, after the award is issued. The case of an arbitral award ruling in favour of a foreign investor raises the problem of determining whether the Union or the host Member State must eventually bear the ensuing financial responsibility. Regulation 912/2014 addresses this issue.

As illustrated above, future investment agreements are likely to have a broad scope of application; therefore, the Union and its Member States are probably going to conclude them in the form of mixed agreement, so as to cover both exclusive competences of the Union (such as FDI) and areas which still are within the competence of Member States (such as portfolio investments). In light of this, investment claims could in principle be equally originated by acts taken by the Union or by Member States. For this reason, the problem of the allocation of financial liability for ISDS in the EU is particularly complex.

According to the Article 3 of the Regulation, responsibility should be divided between the Union and the respondent Member State, depending on which subject has given rise to the investor's loss. However, it must be taken into account that the EU is a multi-level legal order, where some of the acts of Member States are not adopted on the basis of an autonomous decision, but rather because EU law requires them to do so. For this reason, Article 3(1)(c) introduces an exception to the general rule of the financial responsibility of Member States for their acts: the Union will be responsible, when the impugned Member State action was required by EU law. In other words, a Member State cannot be considered responsible when its behaviour towards the investor, which the arbitral tribunal deemed incompatible with the applicable IIA, was not discretionary, but mandatorily required by EU law.

Although these principles seem logical in theory, their practical application can be highly complex. In particular, there is no clear view as to the criteria under which a certain treatment of the Member State could be considered "required" under EU law. Directives are the main problem in this regard, since they require Member States to reach a result, but they do not set forth any particular method of implementation. In other words, Member States must comply with the directive, but they are free to use any method of compliance available in their legal system. Therefore, the situation is twofold: on the one hand it could be argued that if an act of the Member State aimed at implementing a directive, it is required by EU law and cannot, therefore, be a ground for financial responsibility of that particular State. On the other hand, however, it could be argued that the directive only identifies the result to be achieved and that, therefore, the treatment afforded by the Member State is contrary to international investment law because that State chose an incorrect method of implementation of EU law. In conclusion, because of the peculiarities of the EU legal order, the framework for the management of financial responsibility between the Union and its Member States will necessarily need a delicate, case-by-case assessment

⁴¹⁴ Bjorklund, A. K. (2013) at 197.

⁴¹⁵ Kleinheisterkamp, J. (2012). On the future investment policy of the EU see also Castellarin, E. (2013).

as to the “required” or “voluntary” character of the treatment which originated the investor’s claim.

Article 19 of the Regulation sets forth a procedure for cases where there is no agreement between the Union and the Member State as to financial responsibility. Whenever the Commission considers that the award should be paid, in part or in full, by the Member State, the Member State and the Commission must immediately enter into consultation to seek an agreement. Within three months of the receipt of the request for payment of the award, the Commission adopts a decision, determining the amount to be paid by the Member State. The Member State can then object to the Commission’s determination within two months; in this case, the Commission will take the objection into consideration. If the Commission rejects the objection, it will adopt a new decision within six months, requiring the Member State to reimburse the amount paid by the Commission together with interest. The Commission’s decision taken during the course of this procedure must be published on the Official Journal of the European Union.

3.4.3.2. Possible Conflicts Between Obligations under the Award and Obligations under EU Law

It is possible that Member States’ obligations under international investment law conflict with obligations arising from the participation to the EU. The case of a Member State disregarding its obligations under the applicable investment agreement has already been analysed in the previous paragraphs: from the point of view of public international law, the fact that the treatment was required under EU law is irrelevant and the investor will, therefore, be able to successfully bring a claim under the ISDS provisions of the investment treaty. The only consequence of the “required” nature of the treatment should be the internal allocation of responsibility: pursuant to Article 3(1)(c) of Regulation 912/2014, Member States are not liable whenever the treatment is required by EU law.

A different problem arises in case an arbitral tribunal issues a decision which runs contrary to EU Law and is, in particular, incompatible with EU public policy. In principle, IIAs should afford foreign investors protection under a public international law regime, which cannot be nullified by provisions of domestic law. However, the problem of incompatibility between the award and EU public policy could be relevant at the enforcement stage. From *Eco Swiss*⁴¹⁶ on, the CJEU has promoted an extensive interpretation of the notion of public policy, which Member States Courts are required to take into consideration when deciding on the validity or the recognition of an arbitral award. In other words, it is possible to imagine that, when the contents of the award are incompatible with EU public policy norms (such as State aid), Member States Courts could deny recognition under Article V(2)(b) of the New York Convention. For this reason, it is particularly important to guarantee the compatibility of future international investment law with the fundamental principles of EU law: only by ensuring the consistency between the two regimes and a shared and commonly accepted notion of public policy, will it be possible to create a reliable system of investment protection and to preserve the efficiency of ISDS mechanisms.

3.5. The Public Perception of Investment Arbitration: Main Points of the Debate

Investor-State dispute settlement (ISDS) has recently been the object of an articulate political debate, mainly focusing on the desirability of its inclusion in the Transatlantic Trade and Investment Partnership (TTIP) and in other investment agreements which the European Union is currently negotiating. This document addresses some of the most recurring arguments which have been put forth in the aforementioned debate and which

⁴¹⁶ Case 126/97 *Eco Swiss China Time Ltd. v. Benetton International NV* [1999] ECR I-3055.

the Commission addressed in the documents relating to its public consultation on ISDS. It must be noted that this document mainly aims at highlighting the conflicting political positions in a balanced way and at summarizing the positions the European Commission has adopted in this regard: as such, it should not be considered an exhaustive scholarly analysis of the topic. Rather, this section is meant to give the readers an overview of the most controversial aspects of ISDS, whilst other parts of the study offer a more detailed analysis of the legal problems arising from the interaction between international investment law and investment arbitration on the one hand, and EU law on the other hand. In light of this, the following overview of the main points of debate is deliberately synthetic and does not include an exhaustive body of footnotes and academic citations, since it mainly aims at portraying common positions in the political debate surrounding ISDS. In addition to a description of the main issues, the section also offers some critical insights and proposals for possible solutions and amendments to the current regime of investment arbitration. Such observations and suggestions reflect the personal views of the authors of this Study.

3.5.1. Does the inclusion of investor-State arbitration in international agreements attract foreign investment?

3.5.1.1. Conflicting Arguments

Critics of international investment law argue that the conclusion of new trade and investment treaties, such as the TTIP (Transatlantic Trade and Investment Partnership), would have no beneficial effects on the economy of the contracting States.

'Proponents of TTIP say that it will lead to £100 billion in extra growth for the EU and act as "the cheapest stimulus package imaginable". However, a recent study commissioned by the UK government actually concluded that the investment section of TTIP would have "few or no benefits" for the UK.⁴¹⁷

Numerous NGOs state that the inclusion of ISDS in future European investment treaties would not result in positive incentives to investment.

'One stated goal of the TTIP is "to achieve the highest levels of liberalisation and investment protection that both sides have negotiated to date in other trade deals."⁶⁹ Within this context, it is important to note that numerous studies have found no significant correlation between a country's level of foreign direct investment and its decision to adopt treaties with broad investor protections including investor-state dispute resolution.⁴¹⁸

However, the European Commission argues that new agreements play a key role in attracting foreign investment and that, to this end, ISDS is an indispensable cornerstone of the current system of international investment law.

'The Commission's assessment of the likely benefits of the Transatlantic Trade and Investment Partnership (TTIP) is based on analysis carried out by the Centre for Economic Policy Research, a leading independent pan-European economic research organization. (...) The CEPR study predicts that an ambitious TTIP deal would increase the size of the EU economy around € 120 billion (or 0.5% of GDP) and the US by €95 billion (or 0.4% of GDP).

⁴¹⁷ World Development Movement, 'The Transatlantic Trade and Investment Partnership (TTIP) – How the EU-US deal threatens people and planet', April 2014,

⁴¹⁸ Sierra Club, 'The Transatlantic Free Trade Agreement: What's at Stake for Communities and the Environment', 18, http://action.sierraclub.org/site/DocServer/TTIP_Report.pdf?docID=13541.

This would be a permanent increase in the amount of wealth that the European and American economies can produce every year.⁴¹⁹

3.5.1.2. Overview

The TTIP and other similar treaties are complex in content, as they include provisions relating both to trade and to investments. Therefore, it is not possible or scientifically correct to assess the economic impact of these agreements as a whole, since different sections affect separate areas of economic relationships and are likely to produce heterogeneous and incomparable effects. In light of this, it is necessary to separate the provisions on investment from the rest of the agreement, in order to assess whether these, and in particular ISDS, have any beneficial effect on the attraction of foreign investment.

This type of study is made particularly difficult by a number of factors. First of all, measuring the flow of foreign investment is not easy: although relevant data is made available annually from UNCTAD, the OECD and the World Bank, the information is not always consistent and reliable. Because of the elasticity of the definition of 'foreign direct investment', the reliability of quantitative analysis can to a certain extent be undermined. Moreover, this data does not take into consideration portfolio investments (i.e. capital investments which do not involve the control over material assets in the host State), even if this kind of investment is usually protected under international agreements. In addition, the available information focuses on the overall flow of foreign direct investment and not on how much capital is being introduced into the host State: thus, even if the State attracts a significant amount of investment from abroad, the flow figure could be negative, in case foreign investors repatriate in the home State more capital than they originally invested.

In light of the aforementioned problems, it is unsurprising that the scientific studies conducted so far on the topic lead to very different results: according to some, international agreements play an important role in attracting foreign investment,⁴²⁰ whilst according to others these instruments have no significant effects on investment.⁴²¹ In other words, there is evidence that investment treaties can increase FDI, but there is also evidence they do not always have such an effect.

Unfortunately, to date studies have been overwhelmingly generalised, rather than sector-specific or country-specific; sectoral studies, focusing on investment relations within certain types of industries or between specific kinds of countries, could lead to more limited but more reliable quantitative results.⁴²²

However, even in advance of that evidence being delivered, it is important to acknowledge that investment agreements can also signal a level of support for foreign investment by a government. From the qualitative point of view, the inclusion of ISDS in particular can be seen as an important mechanism of communication, through which States can demonstrate their willingness to attract foreign investment and to treat them equitably.⁴²³ This can be particularly important for States with a history of poor treatment of foreign investment, as the incorporation of ISDS in particular indicates a commitment to better treatment of such investors in the future.

⁴¹⁹ European Commission, 'Transatlantic Trade and Investment Partnership – The Economic Analysis Explained', 2, http://trade.ec.europa.eu/doclib/docs/2013/september/tradoc_151787.pdf#Explanatory.

⁴²⁰ Neumayer, E and Spess, L. (2005), at 1567; Bankole, A. S. and Adewuyi, A. O. (2013), at 130; Min, B. S. (2010), at 49; Crotti, S., Cavoli, T. and Wilson, J. K. (2010), at 259.

⁴²¹ Yackee, J. W. (2010-2011) at 397; Hallward-Driemeier, M. (2009); UNCTAD, 'The impact on foreign direct investment of BITs' in Sauvant and Sachs, *ibid.*, at 347.

⁴²² Kerner, A., Lawrence, J. (2014) at 107.

⁴²³ Guzman, A. (1998) at 639. Consent to ISDS could be seen as an indicator of 'good governance', enhancing FDI flow: Morrissey, O. & Udomkerdmongkol, M. (2012) at 437-45.

At present, then, the best-supported conclusion appears to be that neither signing an investment agreement nor incorporating investor-State arbitration into an investment agreement guarantees increased FDI. Instead, the effect of such actions will likely depend on the State attempting to attract the FDI. Where that State is already attractive to FDI, either because of a reliable domestic legal system or because the potential rewards of investment are high enough to justify the risks (e.g. often investment in natural resources), then an investment agreement, with or without ISDS, seems unlikely to have a significant effect. By contrast, where a State has a poor reputation for the treatment of foreign investors, or where the local legal system is unreliable, or where foreign investors see no particular reason to invest in a State (e.g. it has no unique resources, so is merely offering the same location advantages as other competing States), then entering into an investment agreement, particularly one including investor-State arbitration, can benefit efforts to attract FDI.

The above would suggest that the incorporation of ISDS into an investment agreement such as the TTIP is particularly complex, as the European Union includes both countries seen as desirable locations for FDI, and countries seen as less attractive. This suggests that the incorporation of ISDS into the TTIP might impose burdens on some Member States without granting corresponding increases in FDI into those States, while generating significant increases in FDI for some other Member States. The incorporation of ISDS into the TTIP, that is, may not be a justifiable decision from the perspective of each individual EU Member State, while nonetheless still being justifiable from the perspective of the EU as a whole, as a means of generating FDI in Member States that are less appealing to foreign investors.

3.5.2. Can investor-State arbitration hinder the sovereign regulatory powers of contracting States and induce a 'chilling' effect?

3.5.2.1 Conflicting arguments

In order to determine whether the provisions of an investment treaty have been breached, arbitral tribunals review acts of the host State and assess whether they violate the applicable provisions of the treaty, which are usually interpreted and applied in accordance with international investment law. Because of this, some commentators argue that investment arbitration can constitute an undesirable limit to the power of sovereign States to regulate in the public interest.

'Essentially, it's a transfer of power from public authorities to an arbitration body, where a handful of people would be able to rule whether a country can enact a law or not and how the law must be interpreted'.⁴²⁴

The public debate on the impact of ISDS on regulatory powers of States has been triggered by some widely-discussed arbitration cases. In *Philip Morris v. Uruguay and Australia*, a tobacco company brought a claim against two host States, which enacted laws aimed at discouraging smoking. The claimant argued that the inclusion of health-related photographs and warnings on cigarette packets infringed its rights, as enshrined in the applicable investment agreements. In *Vattenfall v. Germany I & II*, the claimant (an energy multinational) brought two different actions under the Energy Charter Treaty against Germany, because of its decisions to increase environmental standards and to withdraw from the nuclear energy sector after the Fukushima disaster.

⁴²⁴ Martti Koskeniemi, Helsinki Times interview, 'Professor: Finland's legislative power may be in jeopardy', <http://www.helsinkitimes.fi/finland/finland-news/domestic/8717-professor-finland-s-legislative-power-may-be-in-jeopardy.html>.

Critics have argued that the mere threat of starting arbitration proceedings can discourage the adoption of new legislation and induce a 'regulatory chill': according to this view, small States could be intimidated by the perspective of paying huge damages to investors and the inclusion of ISDS mechanisms in future international investment agreements (IIAs), such as the TTIP, could entice a 'race to the bottom'.

'The commission insists that its Transatlantic Trade and Investment Partnership should include a toxic mechanism called investor-state dispute settlement. Where this has been forced into other trade agreements, it has allowed big corporations to sue governments before secretive arbitration panels composed of corporate lawyers, which bypass domestic courts and override the will of parliaments. This mechanism could threaten almost any means by which governments might seek to defend their citizens or protect the natural world.'⁴²⁵

On the other hand, some commentators argue that ISDS does not hinder the sovereign regulatory powers of the host State. In support of this statement, it is argued that claims cannot be brought on grounds of a mere loss of profit and therefore not every new law which deprives the investor of possible income can be challenged before an arbitral tribunal. Moreover, commentators in favour of ISDS stress the fact that arbitral tribunals can only award compensation and cannot force the respondent State to change its legislation: from this point of view, the system of international investment law and ISDS is deemed to entail less risk than the World Trade Organisation.⁴²⁶ This position has been officially adopted by the European Commission with regard to the inclusion of ISDS in the TTIP:

'It is important to note that only well - founded cases have a chance of being successful. The fact that a policy has been challenged does not mean that the challenge will be successful. The EU will negotiate in such a way so as to ensure that legislation reflecting legitimate public choices e.g. on the environment, cannot be undermined through investor - state dispute settlement. Experience with investor - state dispute settlement up until now confirms that tribunals do not consider it appropriate to undermine public choices. The Vattenfall and Philip Morris cases are on-going so it is not possible to know the outcome. It is interesting to note, however, that Australia's legislation is also being challenged through the World Trade Organisation – though this time by other WTO members. Should Australia lose that case at the WTO it would indeed be under an obligation to change its legislation. This could not happen as a result of the investor - state dispute settlement. Whatever the outcome of the Philip Morris investor – state dispute settlement case, we can be sure that Australia will remain free to maintain its legislation. The same goes for the Vattenfall case and Germany's ban on nuclear energy.'⁴²⁷

The Commission has also addressed this issue in the framework of its public consultation on ISDS.

⁴²⁵ George Monbiot, 'The lies behind this transatlantic trade deal', The Guardian, 22 December 2013, <http://www.theguardian.com/commentisfree/2013/dec/02/transatlantic-free-trade-deal-regulation-by-lawyers-eu-us>.

⁴²⁶ See *infra*, European Commission, 'Incorrect claims about investor-state dispute settlement', 3 October 2013, http://trade.ec.europa.eu/doclib/docs/2013/october/tradoc_151790.pdf.

⁴²⁷ European Commission, 'Incorrect claims about investor-state dispute settlement', 3 October 2013, http://trade.ec.europa.eu/doclib/docs/2013/october/tradoc_151790.pdf.

3.5.2.2. Overview

Investment claims are only successful where the investor can demonstrate that the State's acts are tantamount to a violation of the standards of protection afforded by the applicable treaty. In light of this, not every new legislation or sovereign act can give rise to successful claims and the inclusion of ISDS in investment treaties does not imply that arbitral tribunals will be granted a general power to overturn any initiative taken by the government of the host State.

On the other hand, however, it must also be considered that ISDS panels are international tribunals and, as such, they apply international law (namely international investment law, usually as enshrined in the agreement concluded by the host State and the home State of the claimant investor). Therefore, the fact that a certain act is lawful under the domestic law of the host State is not, *per se*, enough ground to argue that it cannot constitute a violation of the applicable investment treaty: according to a basic principle of public international law, enshrined in Article 27 of the Vienna Convention on the Law of Treaties, domestic law cannot be invoked in order to rule out the violation of an international obligation. For example, the investor's assets could be expropriated pursuant to a procedure that is considered lawful under domestic law, but results in a violation of the protection against expropriation standard included in the investment agreement. Similarly, the contents of a validly approved law could be in breach of the duty of the host State to afford fair and equitable treatment to the investor.

In light of this, it can be concluded that the broadness of the power of an arbitral tribunal to review sovereign choices depends not only on the structure of the ISDS mechanism in itself, but also on how wide and generic the substantive standards of investment protection are. The main reason for this is that many investment treaties were drafted before the 1990s, the decade when foreign investors started to use ISDS frequently.⁴²⁸ As a result, contracting States incorporated provisions enshrining particular substantive standards of protection into the treaties, without having a clear guidance as to how arbitral tribunals would interpret them, and without a clear understanding of the potential consequences of ISDS.

It is, therefore, important to draw a distinction between the potential 'chilling' effect of one of these pre-existing agreements, which we will not address here as it is outside the scope of this section, and the potential effects of an agreement being negotiated now. Although international investment law still retains a certain degree of uncertainty, there is now a background against which States can draft to ensure that their legislative freedom is preserved to the degree desirable. Investment treaties can, for example, afford certain protections (such as the aforementioned cases of protection against expropriation or fair and equitable treatment), but also include specific exceptions in order to allow the host State to take regulatory action in the public interest without incurring liability under international investment law. States can, that is, limit the degree to which any potential regulatory chill might occur through the careful drafting of the investment treaties into which they enter.

In addition, it should also be emphasized that the structure of investment arbitration means that it is inaccurate to place too much emphasis on prior arbitral decisions when evaluating the potential impact of an investment treaty on a State's regulatory freedom. Investment tribunals, that is, are under no obligation to conform to precedents with which they disagree. Although arbitrators commonly refer to past decisions and to the idea of *jurisprudence constante*, they mainly conceive themselves as service providers, with the

⁴²⁸ See, for example, the ICSID Caseload Statistics: <http://documents.worldbank.org/curated/en/2013/01/18801881/icsid-caseload-statistics>.

principal duty to reach the best possible solution for one specific case:⁴²⁹ whether said solution must take into account concepts such as public interest and the regulatory power of the host State depends, to a large extent, on the opinion of the particular tribunal entrusted with the task of resolving the dispute, rather than on the general trends of arbitral case-law.

On the positive side, this system of selection of arbitrators entails that States can guarantee that at least one member of a tribunal holds views favourable to respecting State policy freedom. Consequently, it is simply inaccurate to picture the situation as being one of States drafting agreements that are then handed over to unaccountable arbitrators. Rather, States retain significant influence on the interpretation of those agreements through the mechanism of arbitrator selection.

On the negative side, arbitrator selection also means that there is unlikely to be much certainty in interpretation of investment agreements in the future. This would require uniformity amongst arbitrators across the field, rather than just a decision by a Supreme tribunal that all others must follow. This kind of uniformity is extremely unlikely.

Ultimately, then, the question of “chill” needs to be seen in the context of the reality of international investment agreements. An international investment agreement is not like a domestic law that can simply be redrafted at will if it produces unexpected results. IIAs, like all treaties, are long-term agreements that are rarely renegotiated, as such negotiations can only occur with the agreement of all participating States and require a considerable commitment by the States concerned. In this light, the flexibility of the arbitrator selection mechanism, while admittedly reducing certainty of interpretation of treaties, and thereby potentially increasing regulatory “chill”, also serves as a means of ensuring ongoing input from States into the interpretation of treaties.

Certainty of interpretation is, after all, only a positive thing if the interpretation adopted is a desirable one. All judicial supervision, even by domestic courts, involves a State handing over an element of its sovereignty to a judicial body, and potentially being chilled as a result. However, through the ongoing role of States in arbitrator selection, States retain the ability to ensure that their preferred interpretation of any disputed treaty provision is represented in the tribunal’s deliberations.

3.5.3. Are arbitral awards consistent and predictable? Can they be appealed?

3.5.3.1. Conflicting Arguments

One recurrent point of criticism of the current regime of investment arbitration concerns consistency: according to this view, ISDS is not a reliable method of dispute resolution, since arbitral tribunals are not bound to conform to the existing case-law and proceedings on similar cases can lead to diverging outcomes. Critics also argue that the problem of consistency is made worse by the finality of arbitral awards: in the absence of an appellate mechanism, wrong decisions cannot be challenged before a superior judicial authority.

‘There is a widespread concern about inconsistency and lack of legal correctness in the application of investment treaties by arbitrators. In many instances, tribunals have made decisions based on very different interpretations of the same provisions in a treaty, or similar provisions between treaties. In addition, it is now widely understood that under the rules governing international arbitration in domestic law and at ICSID, arbitrators have the right to be wrong and that the finality of the award and the arbitration process are more important than legal correctness. As a

⁴²⁹ Karton, D. H. (2013), at 76; Berger, K. P. (1992), at 14.

result states can be compelled to pay awards over hundreds of millions of US dollars (and more), even when the decision is wrong in law.⁴³⁰

On the contrary, others argue that the problem of inconsistency can be solved through several remedies, including the introduction of an appellate mechanism, through which inconsistent awards may be set aside and substituted with a different decision. This position has been adopted by the Commission, which also sought the public's input in its public consultation on investor-State arbitration.

'The EU is looking to develop rules that will ensure that tribunals are consistent in the way they treat similar matters of law. The EU's aim is to include in the investment agreements it negotiates a list of people who can act as arbitrators in a particular dispute. This could create an 'esprit de corps' among arbitrators and encourage tribunals to be consistent when awarding damages under the same agreement. The EU will also push for clauses that allow countries that have signed an agreement to agree jointly on how they interpret the agreement or that allow the investor's home country to make submissions in on-going procedures. In addition, the EU believes that on the basis of the agreements we have signed with our trading partners there should be a debate setting up an appeals mechanism for ISDS disputes. This would also lead to greater consistency in how the provisions of investment agreements are interpreted.'⁴³¹

3.5.3.2. Overview

The problem of consistency in investment arbitration is a complex one. On the one hand, no binding system of precedent exists: since arbitrators formally apply a particular investment agreement for the resolution of a single dispute, they cannot be obliged to conform to the contents of past decisions based on different treaties and/or issued between different parties.

On the other hand, however, this is not enough grounds to conclude that arbitral awards are systematically inconsistent: arbitrators commonly refer to past decisions and express the idea that 'like cases should be decided alike',⁴³² even if they are under no legal obligation to do so. Investment awards are published more often than commercial ones and their contents influence the process of decision-making.

Although cases of inconsistencies exist, arbitrators generally tend to avoid an open conflict between the contents of their awards and past decisions on the similar subject matters. When a clear *jurisprudence constante* has emerged in respect of a certain legal issue, arbitrators usually take it into consideration; therefore, similarly to what happens in civil law systems, past decisions play an important role and tend to enhance consistency, although they are not directly binding. Even in the absence of an appellate mechanism, then, the problem of consistency is not completely disregarded by arbitral tribunals, which tend to conform to a developed consistent line of past decisions on analogous matters.⁴³³

However, it must also be considered that in some cases it could be impossible to rely on a clear *jurisprudence constante*, since some aspects of international investment law still

⁴³⁰ Bernasconi-Osterwalder, N. and Mann, H. (2014).

⁴³¹ EU Commission, 'Factsheet on Investor-State Dispute Settlement', http://trade.ec.europa.eu/doclib/docs/2013/october/tradoc_151791.pdf.

⁴³² *Daimler Financial Services AG v Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012, para. 52.

⁴³³ On the role of precedent as a guidance for arbitrators see Cuniberti, G. (2009), at 457-8; Kaufmann-Kohler, G. (2007).

retain elements of uncertainty. It is in these situations where inconsistency between tribunals is most likely to be evident.

In conclusion, it is inaccurate to suggest that arbitral awards are systematically inconsistent, as arbitrators on investment tribunals consciously take into account preceding arbitral case-law and see the existence of a consistent line of past decisions as a reason to reach a particular decision. However, particularly where the broad and elastic nature of some substantive standards of protection included in investment agreements has prevented the development of a consensus amongst preceding decisions, differences in interpretation and application of the law are likely to occur.

Ultimately some risk of inconsistency is an unavoidable element of the use of arbitration in investment disputes. However, the mere existence of inconsistency should not be taken as a problem with arbitration, as the possibility of inconsistency also means that tribunals are free to correct or improve upon preceding decisions, rather than being bound to adhere to them. The important question, then, is not whether inconsistency between arbitral decisions exists, but whether that inconsistency reflects substantive disagreement on points on which the law is genuinely unclear, or results primarily from the ability of parties to appoint arbitrators who hold specific favourable views on the law.

In the former case the inconsistency will eventually disappear, and the interpretation of the law ultimately adopted will be superior to what would likely have been adopted by an appellate tribunal simply deciding the matter by fiat. In the latter case, by contrast, the negative aspects of inconsistency are being incurred with no long-term benefit being gained, and the existence of inconsistency must indeed be seen as problematic. As has been argued above, however, available evidence on the decision-making practices of investment arbitrators clearly supports the conclusion that arbitrators take their responsibilities seriously, and see themselves as engaged in a dialogue aimed at deciding the best interpretation of the law, rather than as individuals appointed solely to impose their own personal views.

One question often raised in this context is whether investment arbitration would be improved with the adoption of an appellate body, capable of delivering binding decisions and thereby eliminating uncertainty. It must be remembered, however, that finality is commonly perceived as one of the main characteristics of arbitral awards: an arbitral decision cannot be challenged in the same ways a first instance court judgment might be appealed. The adoption of any appellate system, then, even if eliminating uncertainty, risks undermining one of the other primary appeals of arbitration as a means of dispute resolution.

It should also be acknowledged that even under the current mechanisms for investment arbitration, challenges of some sort may be available. Under the ICSID Rules,⁴³⁴ for example, parties can request annulment of an award before a Committee of three persons on the basis of five grounds (improper constitution of the tribunal, manifest excess of power, corruption, serious departure from a fundamental rule of procedure and failure to state the reasons on which the award is based). Similarly, in *ad hoc* proceedings, as well as in non-ICSID administered arbitrations, awards can be appealed before national courts of the State where the arbitration is seated, with the grounds for challenge determined by the procedural law of that State.

However, while these options to challenge an investment arbitration award are available, one common feature should be highlighted: the possibility to seek annulment of the award is limited and does not usually extend to any error in the assessment of facts or in the application of law. Consequently, current challenge mechanisms cannot be used to correct

⁴³⁴ Art. 52.

a mistaken award, or to reverse an award that departs from an established line of preceding decisions.

The introduction of an traditional appellate body, then, would be a significant alteration to current practices in investment arbitration. To date, the proposed Comprehensive Economic and Trade Agreement (CETA) between the European Union and Canada does not provide for an appellate body, but simply envisages the possibility of challenging future awards, in case an appellate mechanism will be created.⁴³⁵ As illustrated above, the EU Commission wishes to change this approach in the TTIP and provide for a bilateral appellate body, which could start to operate and review arbitral decisions from the outset. Although it remains to be seen whether these efforts will turn into binding provisions of the treaty, the implementation of an appeal mechanism would further increase the consistency and enhance the persuasive (if not binding) effect of ISDS decisions.

However, as stated above, the current success of arbitration also depends on the finality of decisions, which speeds the final resolution of disputes; therefore, introducing general and undetermined grounds for appeal could have the undesirable effect of discouraging the use of investment arbitration. In light of this, any provisions on appellate review should be drawn carefully and aim at finding a balance between the need for consistency and the stability of arbitral decisions.

Moreover, the introduction of an appellate body would create an additional problem: whilst such a system would obviously increase predictability, the undeveloped nature of international investment law would make it difficult to ensure the recognised legitimacy of decisions issued by that body. In the absence of universally accepted interpretations of the substantive standards of protection, an appellate body would have no choice but to pick one particular interpretation and impose it because its members prefer it to other interpretations, rather than because there is evidence it was intended by the States, or because it is the most accurate interpretation historically, or because it will produce the best results (the likely consequences of adopting a particular interpretation rarely being clear).

As a result, while an appellate body could be successful as a means of imposing consistency, legitimate consistency would only be attainable in cases in which there was already widespread agreement regarding the correct interpretation of the treaty. By contrast, in cases in which the correct interpretation of the substantive law remained widely disputed, an appellate body would serve instead primarily as a mechanism for a small number of adjudicators to impose their own personally preferred interpretation of that law, whether it was ultimately the best interpretation or not.

One final remark regarding consistency is necessary. As already noted, one of the main problems of the current regime of international investment law is that the substantive standards of protection enshrined in investment agreements can be extremely vague and difficult to define. In other words, since international investment law is not yet a fully-formed and consolidated field of law, arbitrators often need to develop specific rules for the application of very broadly written treaty provisions. This process of creative interpretation can, in cases where case-law does not provide adequate guidance, lead to inconsistent results. This, however, is not a consequence of the procedural structure of investment arbitration, but rather derives from the substantive wording of the international agreements that arbitral tribunals need to apply in order to resolve the dispute.

As a result, problems of consistency and predictability can ultimately best be resolved through a clarification of the interpretation and boundaries of the primary substantive

⁴³⁵ Draft text for the prospective Canada-EU FTA, (Jan. 12 2010), Art. X-42(1)(c), <http://www.transnational-dispute-management.com/legal-and-regulatory-detail.asp?key=7888>.

standards of protection used in investment treaties. One means of achieving this goal is the careful and precise drafting of such provisions, replacing the traditional use of broad and vague terms with clearly delineated language. Such an approach, however, also carries the risk that problems will arise which were not considered by the drafters at the time the treaty was negotiated.

A preferable approach, then, is to combine the precise drafting just described with a mechanism through which the States party to the treaty can issue binding interpretations of the treaty, as is currently found in Article 1131(2) of the North American Free Trade Agreement (NAFTA). Such a combination of mechanisms would minimize inconsistencies through the adoption of clear and detailed text, while providing States with a flexible mechanism for addressing any inconsistencies in interpretation that subsequently develop – eliminating those that are problematic through an agreed binding interpretation, while allowing dialogue amongst tribunals to continue where the best interpretation of the law was still unclear.

3.5.4. Is investment arbitration confidential?

3.5.4.1. Conflicting Arguments

Investment arbitration is often criticized as a secretive mechanism of dispute settlement, where matters of public interest are adjudicated behind closed doors.

'It meets in Washington behind closed doors: a mysterious panel of three judges has the power to condemn a government to pay billions in compensation when a company's investment is at risk.'⁴³⁶

Several aspects of confidentiality have been stigmatized by ISDS critics, such as the fact that the existence of the claim is not necessarily brought to the public attention, the contents of the dispute are not publicized, the hearings are conducted in private and the award is not necessarily made available to the general public. Investment claims often revolve around issues of public interest and involve the allocation of taxpayers' funds; in light of this, critics argue that the disputes should not be settled in a confidential environment, far from the public eye.

'The investor-state dispute arbitration system effectively operates as a privatised justice system for global corporations. Unlike civil cases brought in local courts, where proceedings are generally held in public and geographically close to the people impacted, investor-state arbitration cases take place in distant international institutions where affected communities are completely removed and where who testifies and what they say remains secret. The cases are argued behind closed doors by a handful of lawyers, mostly from North America and Europe, with most respondents being governments from the global South.'⁴³⁷

On the contrary, other commentators argue that the problem of confidentiality of investment arbitration is largely overstated, since the system of ISDS is undergoing a process of reform in order to ensure an acceptable degree of transparency. In the public consultation on the inclusion of ISDS in the TTIP, the EU Commission has stressed the importance of this goal:

'The EU's aim is to ensure transparency and openness in the ISDS system under TTIP. The EU will include provisions to guarantee that hearings are

⁴³⁶ Petra Pinzler, Wolfgang Uchatius and Kerstin Kohlenberg, 'Im Namen Des Geldes' (unofficial translation), Die Zeit, 10 March 2014, <http://www.zeit.de/2014/10/investitionsschutz-schiedsgericht-icsid-schattenjustiz>.

⁴³⁷ Mc Donagh, T. (2013).

open and that all documents are available to the public. In ISDS cases brought under TTIP, all documents will be publicly available (subject only to the protection of confidential information and business secrets) and hearings will be open to the public. Interested parties from civil society will be able to file submissions to make their views and arguments known to the ISDS tribunal. The EU took a leading role in establishing new United Nations rules on transparency¹ in ISDS. The objective of transparency will be achieved by incorporating these rules into TTIP.⁴³⁸

3.5.4.2. Overview

Confidentiality is commonly described as a key feature of commercial arbitration, where parties may wish to resolve their disputes without disclosing information before a State court. Investment disputes, however, are structurally different from commercial cases, since the defendant is a State and the arbitral tribunal has the power to review sovereign acts, in order to determine if the provisions of the relevant investment agreement have been violated. For this reason, the confidential character of the proceedings gives rise to significant concerns.

The degree of confidentiality of investment arbitration can depend on several factors, such as the rules of the administering institution and the decisions of the parties. ICSID, for example, publishes some basic information about the registration of all requests for arbitration it receives;⁴³⁹ on the other hand, when the arbitration is *ad hoc* or administered by other institutions (such as, for example, the ICC), the general public might not have any information about the existence of the case or the identity of the parties.

The contents of the proceedings and the resulting award are, in principle, only published if all parties agree.⁴⁴⁰ Therefore, even if investment disputes generally attract considerable attention and they are covered in great detail by specialized media, detailed information is, in many cases, not officially accessible. Nonetheless, while information on the proceedings themselves may be difficult to obtain, most investment arbitration awards are published and are freely available on publicly-accessible websites.⁴⁴¹ In addition, information on the proceedings and on unpublished awards can often be gained through reporting services, although these may require a fee-based subscription.⁴⁴²

The United Nations Commission on International Trade Law (UNCITRAL) has addressed the problem of confidentiality in investment arbitration with its 2014 Transparency Rules for treaty-based investor-State arbitration. The Rules will apply automatically to all UNCITRAL arbitrations conducted under future investment treaties concluded by the European Union; moreover, they can also operate as a stand-alone instrument and apply to proceedings conducted under sets of rules different than UNCITRAL.

The Transparency Rules introduce innovative provisions in the fields of publication of documents, participation of third persons and non-disputing parties and publicity of hearings. Pursuant to the Rules, some basic information about the proceedings will be made public from the outset, such as the names of the disputing parties, the economic sector involved and the treaty under which the claim is being made. Therefore, it would not be possible for an investor to bring a claim against the host State in secret, as the circumstance that a request for arbitration has been filed will be publicly available from the

⁴³⁸ EU Commission, 'Public consultation on modalities for investment protection and ISDS in TTIP', http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152280.pdf.

⁴³⁹ ICSID Administrative and Financial Regulations, Regulation 22(1).

⁴⁴⁰ See e.g. ICSID Arbitration Rules, Art. 48(4).

⁴⁴¹ <http://www.italaw.com/>, for example, publishes a wide range of documents and awards.

⁴⁴² The leading reporting service in this respect is Investment Arbitration Reporter: <http://www.iareporter.com/>

start. As far as documents are concerned, the disclosure is partially automatic and partially discretionary. Thus, the Rules represent a shift towards publicity in investment arbitration, but the tribunal maintains a degree of discretion and can impede the divulgation of certain documents on a case-by-case basis. However, it must be noted that the publication of the most relevant documents, such as the notice of arbitration, the response, statements or written submissions, transcripts of hearings, orders, decision and awards is generally automatic.

Under the Transparency Rules, oral hearings are in principle public: this change will probably result in a higher degree of public scrutiny of the way the public interests involved in the case are balanced with the protection of foreign investors. However, the default rule of publicity meets some limitations: arbitrators can, under particular circumstances, make arrangements to hold the hearing or part of it in private, for reasons of protection of confidential information or to ensure the correct conduct of the proceedings. The tribunal has the power to make logistical arrangements to facilitate attendance, including the use of video links or other means, and it can also decide to hold all or part of the hearings in private, where this becomes necessary for logistical reasons. The Transparency Rules thus impose a higher degree of publicity, whilst arbitral tribunals will need to use their discretionary powers in order to balance transparency with other needs, such as the protection of confidential information.

In conclusion, investment arbitration is already less confidential than commercial arbitration, and its legal framework is currently being reformed in order to ensure the disclosure of all relevant information. In order to understand how this process of reform develops, it is important to take into account that investors cannot impose confidentiality unilaterally. When investors decide to file a request for arbitration against the host State, they must comply with the terms agreed between the contracting parties to the investment treaty. In other words, if home State and host State impose confidentiality in the treaty under which the claim is brought, investors have no choice in this regard. On the contrary, the contracting entities to investment treaties can provide for transparency and publicity: the UNCITRAL Transparency Rules are a clear example in this regard. Arbitrators subsequently comply with the legal framework of the arbitration and with its applicable procedural rules: therefore, if a treaty allows for transparency, arbitrators will disclose the relevant information of the case in accordance with what the investment agreement provides.

3.5.5. Can citizens, local communities and NGOs participate in investment arbitration proceedings?

3.5.5.1. Conflicting Arguments

Investments claims often deal with matters of public interest, such as environmental, health or energy issues, and/or the allocation of taxpayers' funds. For this reason, it has been argued that arbitration is not fit to resolve this kind of dispute, as the private nature of the proceedings makes it impossible for citizens, local communities, NGOs and other stakeholders to participate to the debate. Critics often conclude that investment tribunals are not as reliable as State courts.

'Arbitrators are not tenured judges with public authority, as in domestic judicial systems, but a small clique of corporate lawyers who are appointed

on an *ad hoc* basis and have a vested interest in ruling in favour of business.⁴⁴³

With specific regard to the participation of NGOs and local communities in the proceedings, critics argue that the procedural framework of investment arbitration is not equitable and favours foreign investors over other stakeholders, which can only participate as *amici curiae* but cannot bring claims against the investor.

'One basic problem is that it is not a fair system, in the sense that one side can only play defense. States can only play defense and the system provides no equitable access to justice. It is only the foreign investor who can use this system: not a domestic company and also not a community that might be affected by bad investment of an investor. (...) Imagine that an investor suing a State; a community might also bring in its views by a separate brief. That is not equitable access to justice, it is a highly discriminatory system, discriminating in favour of one group in society, which is foreign investors, and against anyone else.'⁴⁴⁴

Other commentators argue that the current regime of investment arbitration affords all interested parties the right to participate to the proceedings and to express the respective positions.

'The United States is committed to ensuring the highest levels of transparency in all investor-state proceedings. (...) Recent U.S. trade and investment agreements (...) give NGOs and other non-parties to a dispute the ability to participate by filing *amicus curiae* or "friend of the court" submissions, similar to non-parties' ability to make filings in U.S. courts.'⁴⁴⁵

The Commission has adopted the same approach, stressing that the UNCITRAL Transparency Rules guarantee a transparent process of adjudication.⁴⁴⁶

3.5.5.2. Overview

The problem of the participation of third parties in arbitral proceedings falls within the general debate on the 'transparency' of investment arbitration proceedings. The UNCITRAL Transparency Rules differentiate between the allowance of submissions from third persons, which are neither disputing nor a party to the applicable treaty, and non-disputing parties, which are on the contrary parties to the treaty, albeit not directly involved in the claim. Within the framework of future mixed European IIAs, therefore, the application of the Transparency Rules could on the one hand allow the European Commission to submit statements as a non-disputing party even when the Union does not directly act as a respondent, whilst on the other hand NGOs, local communities and other stakeholders could participate to the proceedings as third persons. This, however, does not mean that such subjects would be granted the same procedural rights as disputing parties; rather, their participation would be limited to the possibility to assist the tribunal in fact-finding, through the submission of a brief explaining the position of the organization, community or other body with regard to the dispute at hand. It must be noted that the participation of

⁴⁴³ John Hilary (Rosa Luxemburg Stiftung – Brussels Office), 'The Transatlantic Trade and Investment Partnership – A Charter for Deregulation, an Attack on Jobs, an End to Democracy', http://rosalux.gr/sites/default/files/publications/ttip_web.pdf, 30.

⁴⁴⁴ Pia Eberhardt, TTIP Debate held in Bruxelles at the Transnational Institute, 10-14 March 2014, <https://www.youtube.com/watch?v=dSzh7KwQXL4>, Minute 41:24.

⁴⁴⁵ Office of the United States Trade Representative, 'The Facts on Investor-State Dispute Settlement: Safeguarding the Public Interest and Protecting Investors', 27 March 2014, <http://www.ustr.gov/about-us/press-office/blog/2014/March/Facts-Investor-State%20Dispute-Settlement-Safeguarding-Public-Interest-Protecting-Investors>.

⁴⁴⁶ The contents of the UNCITRAL Transparency Rules are analysed in detail in Chapter 4 of Part C of this Study.

amici curiae or similar third persons is a procedural tool to enable arbitral tribunals to hear all interested stakeholders, but does not entail a full right to be heard or to participate in all of the stages of the arbitration. In the absence of specific provisions in this regard, *amicus curiae* submissions are not likely to influence the outcome of the arbitration significantly: whilst they can ensure that third parties have the possibility to express their views, they do not have a particular impact on the process of decision-making. The reason for this is to be found mainly in the structure of arbitration, which is different than a State court: whilst national judges mainly perceive themselves as public servants exerting a sovereign power, arbitrators see themselves as private professionals acting on mandate of the parties, with the duty to resolve a single dispute.⁴⁴⁷

In light of this, the impact and the utility of *amicus curiae* submissions can be enhanced, if future treaties include them in the structure of the proceedings. Since arbitrators mainly focus on the wishes of the parties (and the States behind the treaty), they can be expected to take *amicus* submissions seriously, if these are not merely left to their discretionary evaluation. The arbitration procedure could be mandated to require that an invitation be elicited in all arbitrations for *amicus* submissions, that a certain minimum amount of disclosure of information be required (to allow substantive comments in *amicus* submissions) and that the requirements of *amicus* participation not be too restrictive (e.g. even subjects without a direct connection with the case, such as academics interested in the development of the law, could be allowed to file briefs). Arbitrators should be expressly authorised to require the parties to respond to particular issues/arguments raised by *amicus*, so that the points raised in the brief are discussed in a sufficient degree of detail within the proceedings.

In conclusion, future agreements could be structured so that *amicus* submissions are seen as an integral part of the ISDS structure, rather than an exception to it (as is currently the case). In this case and inasmuch as the involvement of *amici curiae* is part of their mandate, arbitrators will be much more open to *amicus* participation, as this would not seem as in conflict at all with their perceived primary obligation to the parties.

Apart from *amicus curiae* participation, the current framework of investment arbitration is often criticized because of its perceived unbalance in the filing of claims: investors can initiate proceedings, whilst the host State cannot bring a claim before an arbitral tribunal, but can only “play defense”. The reason for this is to be found in the structure of investment treaties as a whole: since these international agreements, and the inclusion of ISDS provisions therein, aim at protecting national investments abroad and attracting foreign capital, the mechanism of investment arbitration is put in the hands of investors, because this maximizes the potential of capital attraction of the treaty. Creating a system where the host State has the possibility to bring a claim against the investor before an arbitral tribunal would be inconsistent with the overarching goal of investment treaties, which is to protect and encourage investment. On the one hand, such a mechanism could put European investors in a difficult position, as it would make it possible for any host State to initiate arbitral proceedings for the purpose of intimidation. In the case of small investors with limited financial resources, the mere perspective of being subject to claims by the host State could act as an effective deterrent. On the other hand, the possibility for the host State to file actions against investors could be perceived as a risk and therefore decrease the overall level of capital inflow, as foreign investors might opt for host States which do not allow for State claims. Therefore, the implementation of a system where the investor and the host State have an equal possibility to bring claims would be inconsistent with the conclusion of an investment treaty. Investment arbitration should retain its basic protective

⁴⁴⁷ Karton (n 12) 76.

character, whilst the host State should in principle react to unlawful behaviours of the investors under its national civil, administrative and criminal law.⁴⁴⁸

As for the possibility to bring counterclaims, it is necessary to refer to the specific contents of the applicable treaty: counterclaims are allowed, inasmuch as the investment treaty under which the claim is brought provides for them. Therefore, where the applicable treaty allows for it, the host State can react to the investor's claim by filing a counterclaim, whilst it cannot bring an autonomous action. The introduction of counterclaims in future treaties could thus rebalance the procedural rights of the disputing parties: investors would still retain control of the mechanism, but they would also be aware that, in case they initiate arbitration proceedings, the State might react by claiming compensation. As a result, counterclaims could act as an incentive to respect corporate responsibility obligations, since investors would take into consideration that an unlawful behaviour on their side could result in a counterclaim by the host State. In other words, investors would know that a breach of their obligations towards the host State might entail the impossibility to obtain full compensation in case their rights are violated: if the State counterclaim is successful, the investor might have to pay compensation instead. In conclusion, the possibility of counterclaims creates a balance between investor rights and responsibilities, whilst it does not have the same drastic consequences on capital flow as the possibility of autonomous claims by the host State.

3.5.6. Are arbitrators impartial and independent?

3.5.6.1. Conflicting arguments

One of the main points of criticism of investment arbitration is the professional status of arbitrators: devolving adjudicative functions to non-tenured, for-profit professionals is perceived as a threat to impartiality and independence. In this regard, several concerns are commonly expressed: firstly, the world of arbitration is often described as an elite circle, with a limited amount of individuals switching between the role of arbitrator, counsel and witness.

'Just 15 arbitrators, nearly all from Europe, the US or Canada, have decided 55% of all known investment-treaty disputes. This small group of lawyers, referred to by some as an 'inner mafia', sit on the same arbitration panels, act as both arbitrators and counsels and even call on each other as witnesses in arbitration cases. This has led to growing concerns, including within the broader legal community, over conflicts of interest.'⁴⁴⁹

Secondly, critics argue that arbitrators are structurally investor-biased, since many of them are professionals from international law firms and some also sit on company boards.

'Several prominent arbitrators have been members of the board of major multinational corporations, including those which have filed cases against developing nations. Nearly all share businesses' belief in the paramount importance of protecting private profits.'⁴⁵⁰

⁴⁴⁸ Similar arguments have been put forth in European Commission, 'Incorrect claims about investor-state dispute settlement', 3 October 2013, http://trade.ec.europa.eu/doclib/docs/2013/october/tradoc_151790.pdf.

⁴⁴⁹ Pia Eberhardt and Cecilia Olivet, Corporate Europe Observatory and the Transnational Institute, 'Profiting from injustice - How law firms, arbitrators and financiers are fuelling an investment arbitration boom', <http://www.tni.org/sites/www.tni.org/files/download/profitfrominjustice.pdf>, 8.

⁴⁵⁰ Pia Eberhardt and Cecilia Olivet, Corporate Europe Observatory and the Transnational Institute, 'Profiting from injustice - How law firms, arbitrators and financiers are fuelling an investment arbitration boom', <http://www.tni.org/sites/www.tni.org/files/download/profitfrominjustice.pdf>, 8.

Thirdly, the independence and impartiality of arbitrators is questioned because they are professionals paid for each individual appointment.

'The ISDS system lacks conventional institutional safeguards for independence: tenure, prohibitions on outside remuneration by the arbitrator and neutral appointment of arbitrators. The for-profit arbitrators are paid at least 3000 dollar a day. This creates perverse incentives: accepting frivolous cases, let cases drag on, let the only party that can initiate cases win to stimulate more cases, pleasing the official that can appoint arbitrators.'⁴⁵¹

Fourthly, arbitration experts are criticized because they can act both as State advisors in investment agreement negotiations and as counsels and arbitrators in disputes arising out of the same agreements.

'There is a revolving door between investment lawyers and government policy-makers that bolsters an unjust investment regime. Several prominent investment lawyers were chief negotiators of investment treaties (or free trade agreements with investment protection chapters) and defended their governments in investor-state disputes. Others are actively sought as advisers and opinion-makers by government and influence legislation.'⁴⁵²

The EU Commission has taken this criticism into consideration and argues that the problem of conflicts of interest can be solved with stricter rules and the definition of clear boundaries between different professional and economic roles.

'The EU wants to tackle new issues that have come up in the context of ISDS, including conflicts of interests. An example of a conflict of interest would be where the arbitrators judging a case had business links with one of the disputing parties. The EU wants to introduce specific obligations for arbitrators in any future agreements on investment it negotiates with other countries. These obligations will cover conflicts of interests as well as broader questions about the ethics of arbitrators i.e. how they should act in particular situations. So the EU is adopting an innovative approach to ISDS in order to address concerns about conflicts of interests.'⁴⁵³

These aims have been further described by the Commission in the framework of the TTIP public consultation. The Commission argues that TTIP could enhance the reliability of investment arbitration by setting forth a code of conduct for arbitrators, a list of detailed requirements and a roster of qualified individuals to be appointed as presiding arbitrator.

'The EU aims to establish clear rules to ensure that arbitrators are independent and act ethically. The EU will introduce specific requirements in the TTIP on the ethical conduct of arbitrators, including a code of conduct. This code of conduct will be binding on arbitrators in ISDS tribunals set up under TTIP. The code of conduct also establishes procedures to identify and deal with any conflicts of interest. Failure to abide by these ethical rules will result in the removal of the arbitrator from the tribunal. For example, if a responding state considers that the arbitrator chosen by the investor does not have the necessary qualifications or that he has a conflict of interest, the

⁴⁵¹ ACTA Blog, 'Investor-to-state dispute settlement is a rigged system', 28 May 2014, <http://acta.ffii.org/?p=2112>.

⁴⁵² Pia Eberhardt and Cecilia Olivet, Corporate Europe Observatory and the Transnational Institute, 'Profiting from injustice - How law firms, arbitrators and financiers are fuelling an investment arbitration boom', <http://www.tni.org/sites/www.tni.org/files/download/profitfrominjustice.pdf>, 8.

⁴⁵³ EU Commission, 'Factsheet on Investor-State Dispute Settlement', http://trade.ec.europa.eu/doclib/docs/2013/october/tradoc_151791.pdf.

responding state can challenge the appointment. If the arbitrator is in breach of the Code of Conduct, he/she will be removed from the tribunal. In case the ISDS tribunal has already rendered its award and a breach of the code of conduct is found, the responding state or the investor can request a reversal of that ISDS finding. (...) As regards the qualifications of ISDS arbitrators, the EU aims to set down detailed requirements for the arbitrators who act in ISDS tribunals under TTIP. They must be independent and impartial, with expertise in international law and international investment law and, if possible, experience in international trade law and international dispute resolution. Among those best qualified and who have undertaken such tasks will be retired judges, who generally have experience in ruling on issues that touch upon both trade and investment and on societal and public policy issues. The EU also aims to set up a roster, i.e. a list of qualified individuals from which the Chairperson for the ISDS tribunal is drawn, if the investor or the responding state cannot otherwise agree to a Chairperson. The purpose of such a roster is to ensure that the EU and the US have agreed to and vetted the arbitrators to ensure their abilities and independence. In this way the responding state chooses one arbitrator and has vetted the third arbitrator.⁴⁵⁴

According to others, investment arbitration (and especially ICSID arbitration) already guarantees sufficient standards of independence and probity.

'There is nothing secretive or improper about how tribunals are appointed. The usual procedure is that each party chooses one of the three arbitrators and the third is chosen either by the Centre or by the party-nominated arbitrators. In each case, the nominated arbitrators must confirm that they are independent and impartial. The parties have the right to challenge the appointment of anyone not meeting the necessary standards of integrity. Such challenges are rare, even though the prejudiced party would have every incentive to raise a challenge if it perceived bias on the part of the prospective tribunal. In general, while investors and states have free reign to appoint whomsoever they wish as arbitrator, there has emerged an elite of established arbitrators from a diverse range of backgrounds, the vast majority of whom are of the highest intellectual calibre and standard of probity.'⁴⁵⁵

3.5.6.2. Overview

The independence and impartiality of arbitrators is one of the most discussed topics in international arbitration. Arbitrators, like State judges, are under a general duty to be and to appear impartial and independent at all stages of the proceedings. However, arbitrators are not tenured judges, since they only perform adjudicative functions on an occasional basis, nor are they "natural" judges, since they do not exert a sovereign jurisdictional power, but can only decide a case inasmuch as they were appointed as arbitrators in a specific circumstance. Furthermore, in many cases, arbitration agreements provide that each of the parties has the right to appoint one arbitrator: this is an important difference between arbitration and court litigation, as in the latter the parties have no possibility to

⁴⁵⁴ EU Commission, 'Public consultation on modalities for investment protection and ISDS in TTIP', http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152280.pdf.

⁴⁵⁵ Paul Stothard, Dan Allman and Stuart Bruce, King & Wood Mallesons SJ Berwin, 'Unconventional Opinions: the Backlash against TTIP, TPP and Investment Arbitration', <http://www.sjberwin.com/insights/2014/01/23/unconventional-opinions-the-backlash-against-ttip-tpp-and-investment-arbitration>.

select the adjudicators or to have an influence on the composition of the tribunal. Therefore, it is important to take into consideration that, although the duties of independence and impartiality are in principle the same, they operate in a different manner, because of the peculiarities of arbitration.

Although arbitrators are private adjudicators and not tenured judges, they are not, as a rule, generally biased.⁴⁵⁶ When arbitrators decide a case, they tend to preserve their individual reputation of independence and impartiality, rather than protecting the interests of their professional category as a whole. Of course, this does not mean that problems of partiality and conflicts of interest cannot arise; however, these issues are not structural, but limited to particular situations. In this regard, a traditional remedy is the challenge of arbitrators: where a particular case gives rise to doubts of partiality, parties can challenge the arbitrator and ask for a substitution. In administered arbitration, these challenges are generally decided by the arbitral institution: for these reasons, with some notable exceptions, the relative case-law remains confidential. However, it is widely accepted that successful challenges of arbitrators are fairly rare, since parties are often unable to prove the alleged partiality.

Recently, the international arbitration world has witnessed the introduction of additional mechanisms aimed at ensuring the independence and impartiality of arbitrators, such as the IBA Guidelines on Conflicts of Interest in International Arbitration. The use of these instruments has had the positive effect of encouraging arbitrators to disclose every circumstance that could potentially create suspicions of partiality. Nevertheless, the existing rules do not prevent legal professionals from acting both as an arbitrator and as a counsel in different and unrelated proceedings. This practice, commonly accepted in commercial arbitration, is increasingly criticized in the context of investment disputes; in this respect, future European agreements could introduce a clear distinction between the two roles, in order to differentiate permanently between partial and impartial professional positions. However, such a solution would entail some major complications: since most professionals in the field only get appointed as arbitrators sporadically, a mandatory distinction between counsels and arbitrators would result in a drastic limitation of the number of available arbitrators and in the impossibility for newcomers to enter this field of legal practice.

According to the EU Commission proposals, an additional way to maintain control over the expertise and the independence of the arbitrators would be to set up a roster of professionals possessing adequate requirements. The use of such a roster of arbitrators is already a common feature of international arbitration; however, the list is generally not binding on the parties, and if it is binding at all is so only as far as the chairman of the tribunal is concerned. In other words, the presiding arbitrator must be picked from the roster, whilst the other members of the tribunal can be freely selected by the disputing parties.

In order to enhance the reliability of arbitration, several proposals have been put forth in this respect, such as the introduction of an obligation to pick every arbitrator from the applicable roster or, more radically, the abolition of the right of each of the parties to appoint one arbitrator.⁴⁵⁷ When parties have the right to appoint one arbitrator, they generally tend to appoint someone whose views will be favourable to them. Although this does not mean that parties are free to appoint a biased arbitrator, party-appointed arbitrators can be perceived as less impartial, since they were selected because of their general views and leanings and therefore they often tend to be more favourable to the

⁴⁵⁶ Keutgen, G. (2012); Lew, J. D. M., Mistelis, L. A. and Kröll, S. M. (2003) at 6.

⁴⁵⁷ Paulsson, J. (2010) van den Berg, A. J. (2011) at 821; On these proposals see also the critical remarks of Brower, Ch. N., Rosenberg, Ch. B. (2013).

party which appointed them. The fact that a single arbitrator has a particular inclination has no significant consequence on the impartiality of the tribunal as a whole, because the balance of the tribunal is ensured by the fact that each of the parties has the same right to appoint one arbitrator. Although this peculiarity of arbitration generally ensures that all relevant views are equally represented within the tribunal, it can also affect the external perception of independence and impartiality: for this reason the aforementioned reforms, such as the inclusion of mandatory rosters or the abolition of party-appointed arbitrators, are currently being discussed. On the one hand, these evolutions could strengthen the normative power of rosters, lists of arbitrators and other similar instruments, and therefore ensure a higher level of expertise and professional quality. On the other hand, however, the possibility to have party-appointed arbitrators is traditionally perceived as one of the key advantages of arbitration, since it makes it possible for parties to influence the composition of the tribunal in light of the concrete peculiarities of the case at hand.

In the particular case of investment arbitration, State-appointed arbitrators play an important role in enabling States to maintain a certain control over the interpretation of treaty clauses. Therefore, provisions stating that every member of the tribunal must be picked from a certain list of arbitrators, or must be appointed by the administering institutions with no possibility for the parties to influence such a choice, would result in the creation of a more institutionalized and less flexible mechanism of dispute resolution, where only a limited *élite* of professionals can be appointed as arbitrators.

Critics of ISDS often argue that investment cases are decided by a small, closed circle of specialists, coming from big law firms mostly based in North America. Available statistics demonstrate that a limited amount of individuals are repeatedly appointed as arbitrators or counsels in a wide range of investment disputes; however, the introduction of a roster of arbitrators seems to be inconsistent with the idea of opening this professional field to a broader number of individuals. International investment law is a highly specialized field of law, where relatively few professionals can offer an adequate level of expertise. In light of this, providing for a mandatory list of arbitrators with strict requirements of preparation and experience could result in even stronger restrictions on the possibility for new professionals to enter the investment arbitrator market, albeit undoubtedly ensuring a high level of professionalism.

It is important to analyse the reasons why the same individuals are repeatedly appointed as arbitrators in investment cases. In investment arbitration, the number of legal issues at stake is usually limited and easily identifiable: claims commonly revolve around the same standards of protection and tend to be similar in content. Therefore, it is easy to foresee what the substantive legal views of a particular arbitrator will be: in light of this, parties have a strong incentive to pick one particular arbitrator, since the views expressed by that specific member of the tribunal will increase the chance for the appointing party to win the case.

The problem of repeat appointments, thus, derives from the strategic incentives of the parties, and could be resolved by precluding the appointment of arbitrators who can reliably be predicted to rule on a certain way on a particular issue. Such a mechanism would increase uncertainty in the short term, since it would make it impossible to predict the legal views of the members of the tribunal, but it would eventually result in the establishment of a more diverse group of arbitrators. In the long term, this reform could have a beneficial effect on the evolution of international investment law and in the solidification of the most common standards of protection. In addition to that, opening the field of arbitrators to new professionals would have a beneficial effect on the perception of reliability and transparency of investment arbitration.

One of the concerns that the European Commission has addressed in its proposals is the problem of expertise of arbitrators. In this regard, it must be noted that the appointment of retired judges from the contracting States does not necessarily vouch for expertise in the fields of international economic law and international dispute resolution. On the contrary, these fields of law are not commonly dealt with by national courts, but rather fall within the jurisdiction of international tribunals and courts; as a result, retired judges would generally lack the expertise and the specialization necessary to resolve international investment disputes. Even judges with a specific background in investment cases under domestic law would not necessarily be well prepared to resolve a dispute under international investment law, which has its own terminology and normative canons. It could be argued that retired judges could acquire the necessary expertise by adjudicating disputes and thus familiarizing with this new field of law; such an argument, however, should be rejected, as investment claims are usually extremely delicate and involve very high sums of money. In light of this, the proposal to prioritise the appointment of members of national judiciaries to investment arbitration tribunals should be rejected; rather, future investment treaties should aim at opening the field of arbitration to a wider and more diverse group of professional adjudicators with the necessary expertise.

3.5.7. Do funders profit from investment claims?

3.5.7.1. Conflicting Arguments

Critics of ISDS argue that this system of dispute resolution is made unreliable by the presence of private funders, which cover the costs of the investors' claims in exchange for a share of the sums awarded by arbitral tribunals at the end of the proceedings.

'By funding lawsuits that might otherwise settle quickly or die altogether, third-party funding has the potential to multiply the number of investment disputes brought before arbitrators. (...) A good funding agreement effectively removes the financial risk of an expensive claim. This means that a corporation can file a claim then pass the cash drain and the risk to a funder while waiting for a payout, making arbitration against states even more attractive for businesses. If the money doesn't come, the claimant has nothing to lose, but the defendant (a government) has still been forced to pay top-tier firms for their services.'⁴⁵⁸

Although the problem of third-party funding has not been addressed specifically by the European Commission in its official statements, it has been articulately discussed in the academic debate. The advantages and problems arising from this phenomenon will be analysed in the following section.

3.5.7.2. Overview

Third-party funding is a growing trend not only in investment arbitration, but in general in any kind of arbitration or civil litigation.⁴⁵⁹ Legal costs are constantly increasing and can, sometimes, make it difficult for small- and medium-size claimants to bring an action before the competent authority. In commercial arbitration, third-party funding can be seen as a useful instrument to guarantee access to justice; in investment disputes, on the contrary, third-party funding also gives rise to significant concerns, in light of the particular interests

⁴⁵⁸ Pia Eberhardt and Cecilia Olivet, Corporate Europe Observatory and the Transnational Institute, 'Profiting from injustice - How law firms, arbitrators and financiers are fuelling an investment arbitration boom', <http://www.tni.org/sites/www.tni.org/files/download/profitfrominjustice.pdf>, 59.

⁴⁵⁹ Pinsolle, Ph. (2013); Beisner, Jessica Miller and Gary Rubin, 'Selling lawsuits, buying trouble - third-party litigation funding in the United States', <http://legaltimes.typepad.com/files/thirdparty litigation financing.pdf>; Lisa Bench Nieuwveld and Victoria Shannon (eds), *Third-Party Funding in International Arbitration* (Kluwer 2012).

involved in this kind of cases. Third-party funding is often considered incompatible with the structure of investment arbitration, with the involvement of taxpayers' money and with the ensuing need for transparency. Some commentators are concerned that the increasing involvement of funders could result in an uncontrolled growth of investment claims for merely lucrative reasons.⁴⁶⁰

Future investment agreements can address the aforementioned problems and reform the current system of ISDS in several ways. The first, radical solution would be to include a general prohibition against the practice of third-party funding; however, it must be taken into consideration that such a provision would make it impossible for investors lacking adequate financial resources to file a claim, even in cases where the host State has evidently violated the investment treaty. As the right of access to justice could be frustrated by an unrestricted prohibition, the best view is that the phenomenon of third-party funding should be regulated and controlled.

A possible remedy would be the introduction of transparency duties, imposing an obligation on claimants to disclose all sources of funding. This way, the arbitral tribunal would be able to evaluate the nature and the relevance of the economic and financial interests lying beneath the claim. Drawing a clear and transparent distinction between the claimant and the funder would also make it possible to control the influence of the third party over the procedural strategy adopted by the investor in the proceedings. In particular, through transparency the tribunal would be enabled to assess whether a particular position taken by the investor in the arbitration only reflects its own views on the merits of the case, or might also be influenced by the funder and by its underlying economic interests, which might be wider than the ones involved in that specific claim.

As for the risk of frivolous or ungrounded claims, it is myopic to conclude that the prohibition of third-party funding would eliminate the financial pressure to file claims and therefore limit the incentive to start investment proceedings in the absence of substantive violations of the investor's rights. The problem of abuse of process is not specific to investment arbitration, but exists in any kind of arbitration or civil litigation. Generally, the most effective remedy is the use of provisions on legal costs, according to which the loser pays the costs of the whole proceedings. Such a rule, adopted in most systems of civil procedure, has a fundamental impact in discouraging abusive claims: an 'explorative' attitude of the claimant, bringing an action in situations where no certain legal grounds exist, can result not only in the rejection of the claim, but also in an obligation to pay large sums to the winning respondent. The introduction of such a mechanism in future European investment agreements would effectively contribute to discouraging the abuse of investment arbitration.

The main problem with cost allocation is that it might be ineffective in case the investor has no funding to pursue the case: if the claimant has no money to pay the sanction, even such a mechanism would not effectively discourage the filing of frivolous claims. From this point of view, the introduction of a 'loser pays the costs' principle is strictly linked with the problem of transparency. As stated above, future treaties could impose an obligation to disclose any source of funding; in case a third party funder is involved, the treaties could only allow the case to proceed where the third party funder undertakes a legally binding obligation to pay any legal costs awarded against the investor itself. This would maximize the likelihood that the State would indeed be paid, and also ensure that the third party funder does not promote purely speculative claims, which would result in a potentially negative economic effect.

⁴⁶⁰ Bertrand, E. (2011) at 607.

3.5.8. Is the wording of IIAs too broad and does it allow for abusive claims?

3.5.8.1. Conflicting Arguments

Critics of investment arbitration argue that the standards of protection enshrined in treaties are too vague and thus allow investors to bring abusive claims, in situations where no protection should be afforded by international law.

'The fair and equitable treatment (FET) obligation is the most widely invoked standard in investment treaty arbitration. Due to the broad and vague wording associated with traditional formulations of this obligation, tribunals have delivered such widely differing interpretations that it is difficult to predict when the actions of a state will violate the standard.'⁴⁶¹

On the opposite side, it has been argued that standards of protection under investment treaties are not different from the substantive rules of many advanced national systems and that, therefore, concerns in this regard are not particularly relevant.

'Investment protections are intended to prevent discrimination, repudiation of contracts, and expropriation of property without due process of law and appropriate compensation. These are the same kinds of protections that are included in U.S. law. But not all governments protect basic rights at the same level as the United States. Investment protections are intended to address that fact. Our agreements provide no new substantive rights for foreign investors. Rather, they provide protections for Americans abroad that are similar to the protections we already provide Americans and foreigners alike who do business in the United States.'⁴⁶²

3.5.8.2. Overview

Unlike national legislation granting private rights, the wording of investment treaties is sometimes very broad: the concepts of 'fair and equitable treatment' and 'indirect expropriation' are clear examples in this regard. As a result, investment tribunals often need to resolve disputes by interpreting general clauses, rather than simply applying a detailed substantive rule. In this respect, investment arbitration law is significantly different from any national system of private law, where substantive rights are usually clearly defined by the legislator and by subsequent case-law.

However, it would be incorrect to conclude that such a feature of international investment law was originally designed for the purpose of allowing for abusive claims. Rather, the broadness of investment treaties stems from the historical origins of this particular branch of international law, which was developed recently through the establishment of a procedural structure of dispute resolution (investment arbitration), but without any universally accepted notion of the applicable substantive rules. Therefore, the vague wording often used in investment treaties does not derive from a structural bias in favour of investors, but from the relatively young and fluid nature of international investment law as a legal discipline.

In light of the evolution that international investment law is currently undergoing, the traditional broadness and elasticity of investment treaties should be limited. This, however, would not serve the particular purpose of avoiding abusive claims, but would more generally aim at enhancing legal certainty and contributing to the establishment of the rule

⁴⁶¹ Bernasconi-Osterwalder, N. and Mann, H. (2014).

⁴⁶² Office of the United States Trade Representative, 'The Facts on Investor-State Dispute Settlement: Safeguarding the Public Interest and Protecting Investors', 27 March 2014, <http://www.ustr.gov/about-us/press-office/blog/2014/March/Facts-Investor-State%20Dispute-Settlement-Safeguarding-Public-Interest-Protecting-Investors>.

of law. In this respect, attempts at reform are made more difficult by the fact that States have already concluded a great number of Bilateral Investment Treaties (BITs), which commonly share a similar, vague legal language. The new competence of the European Union to conclude investment treaties under Article 207 TFEU is a fundamental opportunity to reshape the main substantive concepts of international investment law. The introduction of detailed definitions and specific standards of protection would not only enhance the legitimacy of the system as a whole, but would also allow for a better predictability of future claims. Since international capital flow is no longer mono-directional, it is likely that, under future treaties including ISDS mechanisms, not only would European investors bring claims against third States, but the European Union and its Member States would also be respondents in arbitration proceedings.

This evolution should not lead to the conclusion that investment arbitration must be rejected as a whole, since this would result in the loss of a fundamental protection of European investment abroad and in a re-politicization of investment disputes. Rather, it should be seen as an opportunity to reform the existing system. A crucial point of said reform should be a careful wording of substantive provisions, with detailed rules as to how arbitral tribunals must resolve disputes and balance all relevant interests.

In conclusion, the only short-term solution to the problem of the broadness of IIAs is a careful drafting of future treaties: in this respect, the European Union should aim at clarifying the meaning of general standards of protection through detailed definitions.

3.5.9. Can investors pick the BIT under which they wish to bring a claim, using their subsidiaries?

3.5.9.1. Conflicting Arguments

The current landscape of international investment law is dominated by bilateral treaties, through which a contracting State provides certain standards of protection to the investors of another particular State. In light of this, and despite a considerable trend of convergence of investment agreements towards uniformity, the substantive rights of foreign investors can in principle change, depending on the nationality of the investor. However, things are made more complicated by the fact that many investors have a complex corporate structure, with different companies incorporated in different States and related to each other. Therefore, investors can sometimes invoke more than one treaty, using a particular company of the group to file the claim; this practice is often perceived as abusive, especially where the company is a simple 'shell' or 'mailbox', without any substantial relationship with the real nationality of the investor.

'Lawyers (...) assist investors in picking the most investor-friendly treaties for their claims against states – what is known as 'BIT shopping' (...). Thanks to their global reach, multinationals can sue the same country in several fora, on the basis of the same facts'.⁴⁶³

The European Commission has taken this kind of criticism into account and reacted to it in numerous public statements, stating that future agreements will impose clear rules preventing multinationals from choosing the most convenient forum through forum- and treaty-shopping techniques.

'we will crack down on cases where lawyers have used legalistic technicalities to build frivolous cases against governments. (...) We will ban

⁴⁶³ Pia Eberhardt and Cecilia Olivet, Corporate Europe Observatory and the Transnational Institute, 'Profiting from injustice - How law firms, arbitrators and financiers are fuelling an investment arbitration boom', <http://www.tni.org/sites/www.tni.org/files/download/profitfrominjustice.pdf>, 26.

companies from simultaneously taking actions in domestic courts and under international investment agreements'.⁴⁶⁴

3.5.9.2. Overview

The question whether it is possible for multi-nationals to adopt treaty-shopping techniques exploiting their corporate articulate structure cannot be resolved in abstract. Rather, it is necessary to determine the relevant concept of 'investor' and the requirements that the invoked investment treaty sets forth for bringing an action before an investment arbitration tribunal.⁴⁶⁵

In some cases, the concept of 'investor' is very broad and does not take into particular consideration the problem whether the legal person bringing a claim has some substantial connection with the contracting home State, or is merely a 'mailbox' or 'shell' entity. Under such circumstances, arbitral tribunals only take into consideration the place where the claimant company is legally constituted, even in the absence of any other connection.⁴⁶⁶ In other cases, the treaties limit the scope of the definition of investor: in such situations, an arbitral tribunal could conclude that a company cannot bring a claim through any subsidiary investment vehicle, in the absence of some tangible connection with the contracting State, for the mere purpose of invoking a treaty concluded between said State and the host State.

There are several techniques through which international agreements limit the scope of the relevant concept of investor. The first one is to draw a detailed definition of 'investor', so that the possibility to exploit a multinational corporate structure for purposes of treaty-shopping is limited. For example, instead of referring to the place of incorporation, which is a purely formal legal concept, some treaties specify that the nationality of the investor is the place of effective management of the company or business (*siège social*).⁴⁶⁷

In other cases, international agreements refer to the nationality of the person exercising actual control over the investment vehicle.⁴⁶⁸ As a result, where the claimant is a shell legal entity, without any tangible controlling power, arbitral tribunals can pierce the corporate veil and thus avoid treaty-shopping.⁴⁶⁹

These drafting techniques can be merged and put in connection in several ways, in order to ensure that the formal nationality of the investor coincides with a real, material connection with the alleged home State.⁴⁷⁰

A different approach to the problem is to maintain a broad definition of investor and include an exception clause, pursuant to which the benefits of investment protection can be denied where the investor has no substantial business activity in the contracting State.⁴⁷¹

⁴⁶⁴ European Commission Directorate-General for Trade, 'Investment protection does not give multinationals unlimited rights to challenge any legislation', 20 December 2013, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1008>.

⁴⁶⁵ The effects of complex corporate structures on the notions of nationality and home State are analysed in detail by Kalotay, K. (2012) at 542-555.

⁴⁶⁶ In *Tokios Tokéles v. Ukraine*, ICSID Case No. ARB/02/18, the investor brought an action under the Lithuania-Ukraine BIT, since the place of incorporation of the company was Lithuania, even if the vast majority of the shareholders and management was Ukrainian.

⁴⁶⁷ UNCTAD, 'Scope and Definition: UNCTAD Series on Issues in International Investment Agreements' (U.N. 1999) 38. An example in this regard is the Germany-China BIT, entered into force on 11 November 2005, Article 1(2).

⁴⁶⁸ Organization for Economic Cooperation and Development (OECD), 'International Investment Law: Understanding Concepts and Tracking Innovations' (2008) 24.

⁴⁶⁹ The existing case-law provides several examples of arbitral tribunals piercing the corporate veil in order to determine the actual control over the investment vehicle: see for example *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Jurisdiction, 21 October 2005; *Société Ouest-Africaine des Bétons Industriels (SOABI) v. Senegal*, ICSID Case No. ARB82/1, Decision on Jurisdiction 1 August 1984.

⁴⁷⁰ See for example the Sweden India BIT, entered into force on 1 April 2001, Article 1(d), combining the concepts of incorporation, ownership and control.

Although the rationale is analogous, the two techniques are different: the former aims at avoiding treaty-shopping by restricting the notion of national investor, whilst the latter includes a broad and generic definition of 'investor', but adds a clause according to which arbitrators have the possibility to deny investment protection. In both cases, arbitral tribunals denying protection on grounds of abusive treaty-shopping must take into account factual circumstances suggesting that the investor has no real link with the home State whose investment agreement is being invoked: therefore, a certain degree of discretion is required.

In this regard, an additional fact must be considered. The possibility for investors to invoke protections included in treaties different from the ones concluded by their home State of origin does not exclusively derive from the abuse of treaty-shopping techniques. In many cases, this is an effect of most-favoured-nation (MFN) clauses, i.e. provisions that require States to provide investors with a treatment no less favourable than that accorded to investors of any third country. As a result of such clauses, investors may be able to invoke any provision from any other treaty, where the protection enshrined therein is more favourable. In light of this, the possibility for investors to select the most convenient form of protection should be limited not only by taking into account the relevant notion of 'investor', but also through a circumspect and careful use of MFN clauses.

In conclusion, the possibility of treaty-shopping largely depends on how treaty provisions are drafted, and can be effectively limited through a careful wording of the definition of investor and a limitation of the scope of application of MFN clauses:⁴⁷² these elements should be taken in consideration in future European agreements, as they can have fundamental consequences on the overall impact of these treaties.

3.5.10. Are human rights or other similar internationally recognized obligations taken into account by arbitral tribunals?

3.5.10.1. Conflicting Arguments

According to some commentators, arbitral tribunals disregard the role and the importance of human rights, or other similar internationally recognized obligations.

'Investor-State claims often involve matters of vital importance to the public welfare, the environment, and national security. However, international arbitrators are not ordinarily well versed in human rights, environmental law, or the social impact of legal rulings.'⁴⁷³

The EU Commission argues that, under future European agreements, arbitral tribunals will not be free to disregard such international obligations, as the treaties will protect the Union's policy space in areas such as human rights and environmental standards.

⁴⁷¹ See for example the Austria-Libya BIT, entered into force on 1 January 2004, Article 9 and the Austria-Lebanon BIT, entered into force on 30 September 2002, Article 10. According to the *Generation Ukraine* and *AMTO* tribunals, the host State invoking a denial of benefits clause has the burden to prove that the claimant company has no substantial activity in the home State: *Limited Liability Company AMTO v. Ukraine*, Arbitration Institute of the Stockholm Chamber of Commerce, Arbitration No. 080/2005, Award 26 March 2008; *Generation Ukraine Inc. V. Ukraine*, ICSID Case No. ARB/00/9, Award 16 September 2003.

⁴⁷² An example of limitation of the scope of the MFN clause can be found in the recent EU-Canada Comprehensive Economic and Trade Agreement (CETA), according to which (Article X.7(4)) 'the "treatment" (...) does not include investor-to-state dispute settlement procedures provided for in other international investment treaties and other trade agreements. Substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute "treatment", and thus cannot give rise to a breach of this article, absent measures adopted by a Party pursuant to such obligations'.

⁴⁷³ Jane Kelsey and Lori Wallach, "'Investor-State" Disputes in Trade Pacts Threaten Fundamental Principles of National Judicial Systems', <http://www.citizen.org/documents/isds-domestic-legal-process-background-brief.pdf>, 2.

'We need the debate to be about the ISDS provisions we are considering to include and not some imaginary alternative. The Commission's current ideas are available black on white in the consultation document. They have been carefully drafted to ensure that damage claims can only be raised for very clear violations of very fundamental principles of investor protection and that the policy space is fully preserved. Contrary to what is alleged by some scaremongers, a US multinational will not be able to successfully sue for damages for lost future profit just because a parliament introduces a new law with the legitimate aim of protecting the environment or public health.⁴⁷⁴

3.5.10.2. Overview

Since arbitral tribunals have the duty to apply an investment treaty in order to resolve the dispute brought before them, the extent to which human rights or other similar internationally recognized obligations can play a role in investment arbitration largely depends on the contents of the applicable treaty. In addition, the possibility to take into account international obligations also depends on the nature of the source of law enshrining the obligation: in light of this, several distinctions must be drawn.

In many cases, international obligations (such as human rights or environmental standards) are enshrined in a specific international law instrument. In this regard, two situations must be differentiated: sometimes, the applicable investment treaty includes a reference to these other instruments, and therefore limits its scope of application in order to ensure the respect of the obligations enshrined therein. Under said circumstances, there is no doubt that an arbitral tribunal must take into account the human rights or the other obligations protected under that particular instrument. Therefore, if future European IIAs expressly referred to human rights obligations, underlining their binding authority, arbitral tribunals would have to take them into consideration in their decisions. In other situations, however, the applicable investment treaty does not refer to other international law instruments, which are therefore not directly applicable by the tribunal. For this reason, it must be concluded that the drafting of investment treaties is particularly important, since it determines the scope of the arbitral jurisdiction. From this point of view, arbitral tribunals are significantly different from State courts: the latter can apply international law, since they belong to a national legal order which recognizes the relevance of such obligations, whilst the former only have the power to apply the substantive law selected by the parties (in the case of investment arbitration, an investment treaty). Therefore, in the absence of a careful drafting of the treaty and without any reference to human rights or other similar obligations, the jurisdiction of the arbitral tribunal does not extend to such rules of international law.

It is also possible that human rights and other similar obligations constitute international customary law or general principles of international law. In this case, the tribunal may be able to take into consideration these obligations even in the absence of any reference in the treaty, since the arbitrators' duty to apply the investment agreement also entails a duty to apply universally binding provisions of international law, where permissible under the treaty. However, even in this case, arbitrators mainly refer to the wording of the applicable treaty, in order to determine whether particular claims or objections can be taken into consideration. The drafting of treaties is thus particularly important: only in the presence of an explicit reference to overriding general principles of international law, an arbitral tribunal

⁴⁷⁴ Statement by Commissioner Karel De Gucht on TTIP, European Parliament Plenary debate, Strasbourg, 15 July 2014, http://europa.eu/rapid/press-release_SPEECH-14-549_en.htm?locale=FR.

would have the power and the duty to take human rights and environmental obligations into consideration.

In light of the above analysis, it can be concluded that the possibility for arbitral tribunals to consider human rights and other similar international obligations depends both on the contents of the investment treaty and on the nature of the international obligations. The inclusion of a reference to international human rights instruments in investment treaties, as well as general clauses relating to human rights, environmental obligations and sustainable development would make it possible - and necessary - for arbitral tribunals to take these obligations into consideration in any case, notwithstanding the source of law where they are enshrined. On the contrary, in the absence of such a reference, arbitral tribunals might not be able to apply such sources of law, not because of an intellectual or cultural aversion towards human rights, but simply because the arbitral jurisdiction is limited and only covers the subject-matters and the substantive rules which the parties have selected.

It must also be noted that arbitrators are generally not experts in human rights and thus cannot be expected to understand and interpret human rights obligations in the same way a specialized court would. International investment and human rights are different areas of international law and the two fields tend not to overlap in genuine expertise. Moreover, as both the investor and the State usually appoint an expert in international investment law, it is unlikely that arbitral tribunals could offer a high level of specialism as far as human rights and other similar internationally recognized obligations are concerned.⁴⁷⁵

The problem cannot easily be solved with compulsory trainings or screenings on human rights and environmental law: as arbitrators generally have a trade and investment law background, they are unlikely to interpret human rights and other similar obligations in the same way as human rights experts would. Since human rights is a broad field of law and, like investment law, needs a careful interpretation, the best view is that arbitral tribunals should resort to the help of experts. The use of experts in order to ascertain the contents of the applicable law is not new in arbitration: arbitrators commonly use expert testimony to understand the contents of a national law they are not familiar with.⁴⁷⁶ However, in order to make sure that the use of human rights experts⁴⁷⁷ is constant and consistent in all arbitration cases involving the applicability of such obligations, future European treaties could also implement a mechanism of reference: in cases where arbitrators recognize the applicability of human rights or similar obligations, the treaty could set forth a reference procedure, through which a human rights court (such as the European Court of Human Rights), or a special body constituted under the treaty itself, could guide the tribunal. In other words the arbitral tribunal could ask a human rights court or specialized body of human rights experts, selected under the rules of the IIA, to determine the content of human rights law with respect to a specific case, before taking a final decision. This mechanism would be similar to the CJEU preliminary reference system in the European Union. Although such a procedure would require additional time, thereby making the arbitral proceedings longer, it would also make it possible to take into adequate consideration and balance both international investment law and human rights and similar obligations.

⁴⁷⁵ The points made in this paragraph regarding human rights also apply to other obligations, including environmental rights, labour rights, etc. However, for the simplicity of discussion these are classified here under the broad "human rights" label.

⁴⁷⁶ Kaufmann-Kohler, G. (2005) at 631.

⁴⁷⁷ Where "human rights" is understood in the term described in footnote 476.

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